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Supreme Court, U.S.
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In The

Supreme Court of the United States

WALTER LORD,

Petitioner,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior, and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Amendment's guarantee of Due Process require the Government to have provided Walter Lord with sufficient notice, reasonable time to comply, and an oral hearing before the Government denied Lord's Alaska Native Allotment, or may the Government instead eliminate the requirement of an oral hearing by promulgating a regulation?

2. Was Walter Lord's Alaska Native Allotment application "pending before the Department of the Interior on or before December 18, 1971" within the meaning of § 905(a) of the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), 43 U.S.C. § 1634(a), so that Lord's Allotment either is legislatively approved or must be adjudicated?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit has not been reported. A copy of the decision of the Court of Appeals is set forth in the Appendix. (App. 1-2)

The decision of the United States District Court is reported as *Lord v. Babbitt*, 991 F. Supp. 1150 (D. Alaska 1997). A copy of that decision is set forth in the Appendix. (App. 3-38, 41-49)

An earlier order of the District Court is reported as *Lord v. Babbitt*, 943 F. Supp. 1203 (D. Alaska 1996). A copy of that order is set forth in the Appendix. (App. 50-67)

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals rendered its decision in this case on August 19, 1999, and denied Walter Lord's Petition for Rehearing and Petition for Rehearing En Banc on January 10, 2000. (App. 1-2, 68)

Because Walter Lord's case involves a controversy pertaining to rights and remedies under the Fifth Amendment to the United States Constitution, 5 U.S.C. § 702, 25 U.S.C. § 345, 28 U.S.C. § 1331, 28 U.S.C. § 1346(f), 28 U.S.C. § 1353, 28 U.S.C. § 2409a, and 43 U.S.C. § 1634(a), this Court has jurisdiction under 28 U.S.C. § 1254(1) to review via writ of certiorari the decision of the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

This case involves the following constitutional provisions, statutes, and regulations. Since the provisions are lengthy, pursuant to Supreme Court Rule 14.1(f), the pertinent text is set forth in the Appendix:

United States Constitution, Fifth Amendment;

5 U.S.C. § 702;

25 U.S.C. § 345;

28 U.S.C. § 1254(1)

28 U.S.C. § 1331

28 U.S.C. § 1346(f)

28 U.S.C. § 1353;

28 U.S.C. § 2409a;

43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed 1971)

43 U.S.C. § 1634(a)

43 C.F.R. §§ 67.5(f), .6, .7 and .11 (1963)

STATEMENT OF THE CASE

On May 24, 1957, Walter Lord ("Lord") filed his "Application for Allotment of Lands in Alaska by Native Indians or Eskimos" with the Bureau of Land Management ("BLM") Land Office in Fairbanks, Alaska. (App. 81-82) Lord's application states that he applied to be

allotted under the Act of May 17, 1906 -- the Alaska Native Allotment Act ("ANAA") -- 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed 1971). (App. 81-82) The ANAA was a "Homestead Act" that Congress passed because Alaska Natives could not acquire title to real property under other federal land laws. *Pence v. Kleppe*, 529 F.2d 135, 141 (9th Cir. 1976).

At the time of Lord's Allotment application, the ANAA provided in part:

> Sec. 3. No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

Act of August 2, 1956, Pub. L. No. 931, 43 U.S.C. § 270-3 (1970) (repealed 1971). (App. 74-75) Upon completing the requisite five years of use and occupancy, an Alaska Native Allotment applicant has a vested property right and equitable title to the land that relates back to the initiation of occupancy. *State of Alaska v. Babbitt*, 38 F.3d 1068, 1073 (9th Cir. 1994); *State of Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315, 1319-20 (D. Alaska 1985), *affirmed sub nom. Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987); *cf.* 43 C.F.R. §§ 67.5(f), .6, .11 (1963) (App. 78-80).

Lord stated in his application that he was entering into occupancy of the land on May 24, 1957. (App. 81-82) Lord then completed the use and occupancy requirement. He immediately began to use the land described in his Allotment application for subsistence fishing. (App. 85) He built a fish camp and fish wheel and continued using

the land for a fish camp for subsistence salmon fishing, for cutting and gathering firewood for his household, and for trapping and hunting to clothe and feed his family. (App. 85, 88, 91-92) Lord continued this intensive use of the land into the 1970s and still uses the land today. (App. 91-92)

At the time Lord applied for an Alaska Native Allotment, agency regulations did not require that proof of five years use and occupancy be submitted by any particular time; there was no deadline. (App. 97) However, on December 6, 1958, the Secretary of the Interior adopted regulations that BLM applied to Lord's application. *See* 23 Federal Register 9484-85; (App. 78-79). These regulations, which were codified at 43 C.F.R. Part 67, provided that if evidence of proof of use and occupancy for five years was not submitted within six years of the date of filing an application, the application could be terminated at the end of the six-year period. *See* 43 C.F.R. § 67.5(f) (1963); (App. 78-79). In agency lingo, the six-year period has become known as the "statutory life". (App. 97)

BLM's regulations specifically addressed pre-deprivation notice where, as in Lord's case, the individual submitted his Allotment application *prior* to the promulgation of the six-year "statutory life" regulation:

> If the application was filed prior to the effective date of this paragraph, the application will be terminated under this paragraph only by decision of the authorized officer, *after appropriate notice* to the applicant, granting him a *reasonable* period within which to file proof of continuous use and occupancy of the land as required by the regulation in this part.

43 C.F.R. § 67.5(f) (1963) (emphasis added); (App. 78-79). Correspondingly, BLM's own Native Allotment Handbook states that applicants filing prior to 1958 had until 1964 to file proof of use and occupancy (six years from the adoption of the "statutory life" regulation). (App. 97); *see Lord v. Babbitt*, 991 F. Supp. 1150, 1164-65 (D.Alaska 1997) (App. 34). The Handbook adds that applications that were denied "before the statutory life of the claim expired should be reinstated." (App. 97)

After promulgating the statutory-life regulation, BLM made no attempt to contact Lord until January of 1963 when, BLM claims, it sent a letter to Lord via regular mail General Delivery. (App. 102, 115) Lord never received the letter (App. 90), and the letter erroneously stated that in less than five months, on May 24, 1963, the period in which to submit proof of five years of use and occupancy would expire (App. 102).

In contrast, persons who applied for Alaska Native Allotments *after* the promulgation of the statutory-life regulation were routinely given an initial notice of the six-year period within several months of submitting an application and were then given a second notice several months or more prior to the end of the six-year period. *See, e.g., Heirs of Edward Peter*, 122 IBLA 109 (1992) (initial notice sent on November 1, 1962 of statutory-life period on application filed on February 19, 1962); *Andrew Balluta*, 122 IBLA 30 (1992) (initial notice of statutory-life period sent within five months after application filed); *Michael Gloko*, 116 IBLA 145 (1990) (initial notice of statutory-life period sent within three months after application filed); *Heirs of Saul Sockpealuk, Heirs of Carl Takak, and Heirs of Silas Sockpealuk*, 115 IBLA 317 (1990) (two of the three

individuals received initial notice of statutory-life period within first year after filing applications; other individual received initial notice within twenty months after filing application).

On May 31, 1963, BLM sent Lord a decision denying his Alaska Native Allotment. (App. 104-105, 115) Prior to rendering the decision, BLM did not provide Lord with a hearing, and the decision did not inform Lord of any right to appeal. (App. 104-105)

In 1971, in order to resolve the claims of the Native people of Alaska to aboriginal land title, Congress passed the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1624. Although ANCSA repealed the ANAA, the repeal excepted or saved those Allotment applications pending on December 18, 1971. *See Lord, supra*, 991 F. Supp. at 1155-56; (App. 10-11).

At the time Congress passed ANCSA in 1971, from 7000 to approximately 8700 Alaska Native Allotment applications were pending involving over 400,000 acres of land. *See Olympic v. United States*, 615 F. Supp. 990, 994 (D. Alaska 1985); F. Cohen, *Handbook of Federal Indian Law*, at 745 n. 56 (1982 ed.); D. Case, *Alaska Natives and American Laws*, at 138, 176 n. 48 (1984). As of the passage of ANCSA, the Government had closed 687 Alaska Native Allotment files with 459 of those constituting denials based on the statutory life regulation or on a failure to file a mineral waiver. D. Case, *supra*, at 178 n. 68.

In 1976, the United States Court of Appeals for the Ninth Circuit rendered its decision in *Pence, supra*, 529 F.2d 135. In *Pence*, the Court of Appeals held that "Alaska Native applicants whose applications the Secretary

intends to reject must be given *some* kind of notice and *some* kind of hearing before the rejection occurs." *Id.* at 142 (emphasis in original); *see id.* at 141-43. In so holding, the Ninth Circuit reasoned that in view of the circumstances, Alaska Natives must be provided with an oral hearing and not merely the opportunity to submit written evidence prior to the Government terminating their important rights to be allotted land under the ANAA:

> Likewise, merely allowing the applicant to submit written evidence is inadequate. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance, and there is ample evidence to support the position that Alaska Natives are even less educated and literate than most American welfare recipients . . . . In sum, written testimony is inadequate to satisfy due process when it involves a right as important as the right to be allotted land under the Act.

Pence, supra, 529 F.2d at 142-43.

In 1979, the United States District Court for the District of Alaska rendered its decision in *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979). In *Aguilar*, the District Court held that the Government must obtain reconveyance from the State of Alaska of the lands of any Alaska Native Allottee mistakenly conveyed to the State. *Id.* at 843, 846-47; *see also Lord v. Babbitt*, 943 F. Supp. 1203, 1206-07, 1211 (D. Alaska 1996) (App. 54-56, 64); *cf. United States v. Clarke*, 445 U.S. 253, 254 (1980) (State of Alaska may acquire Alaska Native Allotments lands only via a formal condemnation proceeding in federal court).

By the end of the 1970s, due to the complexities of Native Allotment adjudication, the Government had made little headway adjudicating the thousands of pending Allotment applications, and further uncertainty existed due to *Pence, supra, Aguilar, supra,* and other litigation or potential litigation concerning Native Allotment issues. *See Olympic, supra,* 615 F. Supp. at 994 (quoting S.Rep. No. 413, 96th Cong. 2d Sess. 237-38 (1979) *reprinted in* 1980 U.S. Code Cong. & Ad. News at 5181-82). In 1980, Congress addressed these problems and acted to promote Allotment finality, and thereby the finality of conveyances under ANCSA, by passing the Alaska National Interests Land Conservation Act ("ANILCA"), 43 U.S.C. §§ 1631-1641. *See Olympic, supra,* 615 F. Supp. at 994-95.

In Section 905(a) of ANILCA, 43 U.S.C. § 1634(a), Congress provided that all Alaska Native Allotment applications "which were pending before the Department of the Interior on or before December 18, 1971" are either legislatively approved or must be adjudicated on the merits. (App. 75-78); *see Lord, supra,* 991 F. Supp. at 1164-65; (App. 33-34). In this regard, the legislative history of Section 905(a) indicates:

> An amendment to Section 905 clarifies that the purview of the section includes all Alaska Native allotment applications which were pending before the Department of the Interior on "or before" December 18, 1971. The amendment clarifies that applications which were erroneously rejected without an opportunity for hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section.

Lord, 991 F. Supp. at 1164 (quoting S.Rep. No. 413, 96th Cong. 2d Sess. 238 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News at 5186); (App. 34). The only Allotment applications that Congress excluded from legislative approval or adjudication are those that were knowingly and voluntarily relinquished by the applicant after December 18, 1971. *See* 43 U.S.C. § 1634(a)(6); (App. 78).

ANILCA placed the burden on the State of Alaska to file a legally sufficient protest, if any, in order to avoid legislative approval and thus require an adjudication of Lord's Alaska Native Allotment. *See* 43 U.S.C. § 1634(a)(5)(B); (App. 77-78). On May 7, 1981, the State of Alaska filed an ANILCA protest of Lord's Allotment, and others, on the basis that the lands had been patented to the State of Alaska. (App. 106) The State of Alaska eventually filed ANILCA protests on over 6000 Allotments, although by mid-1983 the State had abandoned all but approximately 1400 of its protests. *See* D. Case, *supra*, at 138, 148.

On January 18, 1982, BLM issued a decision denying the State of Alaska's protest of Lord's Allotment because the State "failed to meet the stated criteria for a valid protest." (App. 108-110) As part of its decision, BLM held:

> If it is later found that any of the allotment applicants had prior valid existing rights on lands subsequently conveyed to the State, action will be taken pursuant to the Ethel Aguilar et al Decision of August 8, 1979 by the United States District Court, Civil Action Filed Number 176-271.

(App. 109) As discussed previously, the *Aguilar* decision requires the Government to obtain reconveyance from the

State of Alaska of Lord's Allotment land and the lands of any other Alaska Native Allottee mistakenly conveyed to the State. *See Lord, supra,* 943 F. Supp. at 1206-07, 1211; (App. 54-56, 64); *see also Aguilar, supra,* 474 F. Supp. at 843, 846-47.

Subsequent to dismissing the State of Alaska's protest of Lord's Native Allotment, the Government conducted at least six secret, unilateral reviews of Lord's Allotment file from May of 1982 to sometime in 1993. (App. 112-114, 119-130) Despite the provisions of ANILCA, in each of these reviews the Government determined not to issue Lord's Allotment. (App. 112-114, 119-130) However, pursuant to an established policy, the Government did not inform Lord of any of its decisions because the decisions were against issuing Lord his Allotment. (App. 113)

In late 1993, Lord obtained an attorney who wrote to BLM and inquired as to the status of Lord's Allotment application. (App. 131) In January 1994, BLM responded that it had unilaterally reviewed Lord's case file earlier in 1993 and had concluded that Lord was "afforded due process and the case file was properly closed on May 31, 1963." (App. 131-32)

In early March of 1994, Lord's attorney again wrote BLM and reiterated Lord's position that his Alaska Native Allotment was legislatively approved by ANILCA. (App. 134) In its May 17, 1994 response, BLM maintained that Lord had not been denied due process and his Allotment was not legislatively approved. (App. 134-37)

On May 24, 1994, Lord filed his initial complaint in the District Court seeking the issuance of his Alaska Native Allotment. (App. 53) Lord's complaint was amended several times culminating in Plaintiff's Third Amended complaint filed February 14, 1997. (App. 138-145) In his Third Amended complaint, Lord sought issuance of his Allotment under ANILCA and other provisions of federal law. (App. 138-145) The bases for jurisdiction in the District Court were then 5 U.S.C. § 702, 25 U.S.C. § 345, 28 U.S.C. § 1331, 28 U.S.C. § 1346(f), and 28 U.S.C. § 1353. (App. 138-139)

On November 5, 1997, the District Court dismissed Lord's Third Amended complaint. (App. 3-38); *see Lord, supra*, 991 F. Supp. at 1153-66. In its order, the District Court held that the Government did not deny Lord due process of law and did not otherwise erroneously reject Lord's Native Allotment. (App. 21-31) The District Court then held that Lord's Allotment was not legislatively approved by ANILCA and that the Government did not need to adjudicate Lord's Allotment under ANILCA because the Government had done so prior to the passage of ANILCA. (App. 31-37) Since the District Court held that Lord's Allotment was not within -- and was thus not revived by -- § 905(a) of ANILCA, 43 U.S.C. § 1634(a), the District Court held that Lord's action was barred by the statute of limitations set forth at 28 U.S.C. § 2401(a) because Lord did not file his complaint within six years of BLM's May 31, 1963 decision. (App. 24-31)

The linchpin of the District Court's decision is the then-recent decision in *Silas v. Babbitt*, 96 F.3d 355 (9th Cir. 1996). In *Silas*, the Court of Appeals mistakenly treated an Alaska Native Allotment as an "entitlement"

instead of a real property interest, took a constricted view of the due process hearing requirement, and construed § 905(a) of ANILCA so that Alaska Natives whose Allotments had been denied prior to the passage of ANILCA are excluded from the statute even though their Native Allotment applications were, within the plain language of the statute, "pending before the Department of the Interior on or before December 18, 1971." *See Silas*, 96 F.3d at 357-59; *Lord, supra*, 991 F. Supp. at 1165-66 (App. 36-37).

On January 20, 1998, the District Court entered an Amended Order. (App. 41-49) In its Amended Order, the District Court further addressed and rejected Lord's arguments: (1) that he did not receive sufficient pre-deprivation notice or a reasonable time to comply; (2) that he was entitled to a hearing before the Government terminated his Native Allotment application; and (3) that his Allotment was legislatively approved or must be adjudicated under ANILCA. (App. 41-42, 44-49); *see Lord, supra*, 991 F. Supp. at 1166-69.

On August 19, 1999, the Court of Appeals affirmed the dismissal of Lord's case, and in so doing essentially adopted the reasoning of the District Court. (App. 1-2) On January 10, 2000, the Court of Appeals denied Lord's Petition for Rehearing and Petition for Rehearing En Banc. (App. 68)

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the United States Court of Appeals for the Ninth Circuit has decided important questions of federal constitutional law in a way

that conflicts with relevant decisions of this Court. It is also respectfully submitted that the Court of Appeals has erroneously decided an important federal question concerning the scope and meaning of § 905(a) of ANILCA, 43 U.S.C. § 1634(a), which has not been, but should be, settled by this Court, and that in deciding the scope and meaning of § 905(a) of ANILCA, the Court of Appeals has done so in a way that conflicts with relevant decisions of this Court.

For one, the decision of the Court of Appeals is contrary to this Court's decisions in *United States v. Locke*, 471 U.S. 84 (1985) and *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) concerning the Fifth Amendment's guarantee of Due Process. In *Locke*, the Court explained that where a legislative enactment regulates private conduct, Due Process requires that the individuals regulated by the enactment receive "a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements." *Locke*, 471 U.S. at 108 (citing *Texaco, supra*, 454 U.S. at 532). In other words, Due Process requires "sufficient notice of their need to comply and a reasonable opportunity to do so." *Locke*, 471 U.S. at 106 n. 15. These Due Process requirements are echoed in the provision that exempted Lord from the statutory-life regulation and stated instead that Lord's application could be terminated only "after appropriate notice to the applicant, granting him a reasonable period within which to file proof of continuous use and occupancy of the land." 43 C.F.R. 67.5(f) (1963); (App. 78-79).

Lord did not receive sufficient notice of any need to submit proof of five years of use and occupancy by a particular deadline. Nor did Lord receive a reasonable opportunity to comply with such a requirement. The January 1963 letter BLM claims it sent to Lord via General Delivery in the dead of an Alaskan winter was never received by Lord. Even if Lord had received the letter, the less-than-five-months of notice of a purported deadline to submit proof of five years of use and occupancy is entirely unreasonable and poses a potential factual impossibility, one not present in the ordinary Allotment case where BLM sent the initial notice shortly after the Allotment application was filed. Furthermore, BLM concluded that a reasonable opportunity to comply with the six-year period necessarily means that Lord should have had at least six years from the passage of the regulation -- until December 6, 1964 -- before the agency denied his application. (App. 58, 97)

In contrast to Lord's case, the enactment that the Court upheld in *Locke, supra,* provided a "3-year period, during which individuals could become familiar with the requirements of the new law." 471 U.S. at 108. Similarly, the enactment that the Court upheld in *Texaco, supra,* provided for a "2-year grace period . . . to become familiar with its terms." 454 U.S. at 532.

Moreover, an important consideration in the Court's decisions in *Locke, supra,* and *Texaco, supra,* is that the enactments involved the determinations of legislative bodies to whose judgment the Court shows the greatest deference. *See Locke,* 471 U.S. at 108-109; *Texaco,* 454 U.S. 532-33. Lord's case, on the other hand, involves an

administrative agency imposing a period where the legislative body had declined to act. The agency then mistakenly applied that period to an individual whose application pre-dated, and thus was not intended to be subject to, the promulgated period. As such, the agency action is so unusual in character that Lord would have no reason to believe that he was subject to the statutory-life regulation. *Cf. Locke*, 471 U.S. at 108 n. 16.

An additional requirement of Due Process is that before Government deprives an individual of a property interest, the individual generally has a right to a hearing. "In an ordinary case a citizen has a right to a hearing to contest the forfeiture of his property, a right secured by the Due Process Clause." *Degen v. United States*, 517 U.S. 820, 822 (1996).

Because an Alaska Native Allotment is a real property interest, Due Process requires the Government to have provided Lord with a hearing prior to denying Lord's Allotment. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) ("*Good Real Property*"). While *Good Real Property* involved an individual's residence, the Due Process requirement of a hearing applies to Alaska Native Allotments as well:

> The constitutional limitations we enforce in this case apply to real property in general, not simply to residences. That said, the case before us well illustrates an essential principle: Individual freedom finds tangible expression in property rights.

510 U.S. at 61.

If an Alaska Native Allotment does not fall within the hearing *per se* rule of *Good Real Property*, the Government was nonetheless required to have provided Lord with a hearing prior to denying his Allotment. In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) the Court set forth the three-part inquiry ordinarily undertaken to determine what process is due:

> The *Mathews* analysis requires us to consider the private interest effected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose.

Good Real Property, supra, 510 U.S. at 53.

As an interest in real property, Lord's interest in his Native Allotment has great weight in the *Mathews* balance. *Good Real Property, supra*, 510 U.S. at 53-55; *cf. Pence, supra*, 529 F.2d at 141-42.

As detailed previously, the risk of erroneous deprivation through the procedures utilized in Lord's case is enormous. Even if Lord had applied for his Allotment after the promulgation of the statutory-life regulation, and was then correctly subjected to its ax, the point remains that the statutory-life regulation is nothing more than an agency attempt at promulgating away the Due Process requirement of a hearing. Possessing no evidence that Lord was not a person entitled to an Allotment, or that the land was not available for Allotment purposes, or that Lord had died or had otherwise not completed five years of use and occupancy, the agency acted in a factual

vacuum, assumed away a real property interest, and did not even inform Lord of any right to appeal. *Compare Silas, supra,* 96 F.3d at 356-57 (face of application indicated that use commenced at a time when land was unavailable for Allotment; agency informed individual of right to appeal); *Pence v. Andrus,* 586 F.2d 733, 743 (9th Cir. 1978) (suggesting that Due Process would not be violated if the Government rejected an application without a hearing where "an applicant files a claim but does not allege that he or she is an Alaska Native"). Moreover, the risk of error in denying a Native Allotment based on the statutory-life regulation is significantly higher than that in *Good Real Property, supra,* where Due Process required a hearing on a forfeiture even though the individual had already been convicted of a drug offense. *See* 510 U.S. at 46.

As the Court of Appeals observed in *Pence v. Kleppe, supra,* in Alaska Native Allotment cases the probable value of additional safeguards in the form of an oral hearing is very high in view of the nature of the relevant inquiry and the educational and literacy circumstances of Alaska Natives at the times pertinent to this case. *Pence,* 529 F.2d at 142-43. Compared to the "entitlement" of a welfare recipient, which the Court held required an oral hearing prior to denial in *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970), the inquiry in a Native Allotment case is more detailed and the individual being inquired of may be less educated and less literate than the typical welfare recipient. *See Pence, supra,* 529 F.2d at 142.

As to the Government's interest in denying Lord's Allotment without an oral hearing, there was no "pressing need for prompt action." *Good Real Property, supra,*

510 U.S. at 56. Rather, the Government could have easily answered Lord's Allotment in the affirmative by undertaking one of its routine visual examinations. *See Pence, supra*, 529 F.2d at 137-38. Requiring an oral hearing would impose little or no additional burden.

The second question presented to the Court is whether Lord's Allotment falls within § 905(a) of ANILCA, 43 U.S.C. § 1634(a), because his application was indeed "pending before the Department of the Interior on or before December 18, 1971." Given the vast number of Allotment applications, the proper construction of § 905(a) presents an important question of federal law that this Court should settle. At a minimum the "or before" language of § 905(a) would appear to encompass the 687 Native Allotment files the Government closed prior to the passage of ANCSA in 1971. More broadly, the language of § 905(a) would appear to encompass all Allotment files the Government closed prior to the passage of ANILCA in 1980.

The obvious problem with the Court of Appeals' construction of § 905(a) in *Silas, supra*, 96 F.2d at 358-59, and thus in Lord's case, is that the construction is contrary to this Court's "cardinal canon" of statutory construction "stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Because the language of § 905(a) is unambiguous, "then this first canon is also the last: judicial inquiry is complete." *Connecticut National Bank*, 503 U.S. at 254 (quotation and citation omitted).

In *Silas*, the Court of Appeals deviated from the plain language of § 905(a) because it thought that requiring the Government to adjudicate Allotment applications that had previously been rejected was contrary to the intent of Congress to expedite Allotment procedures. *See Silas*, 96 F.3d at 358-59; *see also Lord*, 991 F. Supp. at 1165 (App. 36-37). However, even assuming that adjudicating previously rejected applications would increase the backlog of applications, "[j]udicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner of Internal Revenue v. Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987). "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991).

Furthermore, the premise upon which the *Silas* court based its decision is a faulty one. The vehicle by which § 905(a) cleared the Allotment path is that of legislative approval. Of the approximately 9000 Allotment applications that had been made by the time of ANILCA, it is only those Allotment applications that were validly protested that remain to be adjudicated. All others are legislatively approved. The State of Alaska understood this to be the meaning of § 905(a) when it protested Lord's application even though Lord's application had previously been denied. Even if there were then valid protests on all 687 Allotment files closed prior to December 18, 1971, the burden so imposed on the agency would be

light compared to the burden lifted by legislative approval.

Just as the Court in *Locke, supra,* construed the plain language "prior to December 31 of each year" to mean precisely what it says, *see* 471 U.S. at 95-96, so the Court should construe "pending before the Department of the Interior on or before December 18, 1971" to mean precisely what it says. Were there any ambiguity in the language "on or before," the Court of Appeals' decision conflicts with the deeply-rooted principle that statutes pertaining to Allotments "are to be construed liberally in favor ~~of~~ [Alaska Natives], with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation,* 502 U.S. 251, 269 (1992) (quotation and citation omitted) (brackets added).

In sum, Lord's Alaska Native Allotment application falls within the plain language of § 905(a) of ANILCA, 43 U.S.C. § 1634(a), as being "pending before the Department of the Interior on or before December 18, 1971," and as such is legislatively approved, or if not legislatively approved, must be adjudicated. Even if the legislative history of § 905(a) were utilized to narrow the scope of the statute to only those applications that were erroneously denied without a hearing prior to December 18, 1971, Lord's Allotment application is squarely within the statute.

CONCLUSION

For all of the reasons stated, Petitioner Walter Lord respectfully prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

DATED at Fairbanks, Alaska this 10th day of April, 2000.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

WALTER LORD,

Petitioner,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior, and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER LORD, Plaintiff-Appellant, v. BRUCE BABBITT; UNITED STATES OF AMERICA, Defendants-Appellees.	No. 98-35166 D.C. No. CV-94-00011-JKS MEMORANDUM[1] (Filed Aug. 19, 1999)

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted August 6, 1999
Anchorage, Alaska

Before: HUG, Chief Judge, TROTT, and TASHIMA, Circuit Judges.

We affirm the judgment of the district court in dismissing the action, essentially for the reasons expressed in the thorough and carefully reasoned order of the district court. In summary, Lord received notice of the termination of his application for an allotment in 1963 by registered mail, the receipt of which was signed for by his wife. He did not bring this action until 1994. As the

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

district court correctly held, the six-year statute of limitations set forth in 28 U.S.C. § 2401(a) bars this action. Lord makes a complex argument that his claim should be adjudicated under the Quiet Title Act, 28 U.S.C. § 2409a. However, even if that act were applicable, this action would be barred by the twelve-year statute of limitations set forth in § 2409a(g). For the reasons expressed by the district court, there was no basis for equitable tolling of either of these statutes of limitations.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WALTER LORD, Plaintiff, vs. BRUCE BABBITT, Secretary of the United States Department of the Interior, and THE UNITED STATES OF AMERICA, Defendants.	Case No. F94-0011 CV (JKS) ORDER (Filed Nov. 5, 1997)

Walter Lord ("Lord") brings this action seeking to establish his right to a Native Allotment in the vicinity of Fairbanks, Alaska. Lord filed his initial complaint on May 24, 1994. Previously, this Court denied the defendants' motion to dismiss, holding that (1) the Court has jurisdiction over this action pursuant to 25 U.S.C. § 345 and 28 U.S.C. § 1353; (2) the six year statute of limitations pursuant to 28 U.S.C. § 2401(a) applies; (3) the State of Alaska is not an indispensable party; and (4) although the six year statute of limitations applies, the parties failed to squarely address the issue of equitable tolling. *See Lord v. Babbitt*, 943 F.Supp. 1203 (D.Alaska 1996); Docket No. 77 (order).

There are several dispositive motions presently before the Court and the parties have now adequately addressed the issue of equitable tolling. The defendants (collectively "the government") argue that the running of

the statute of limitations deprives this Court of jurisdiction over the majority of Lord's causes of action. The government also argues that Lord's action to quiet title must be dismissed for want of jurisdiction. Finally, the government moves for partial summary judgment dismissing Lord's claims for judicial review pursuant to the Administrative Procedure Act of decisions of the Bureau of Land Management set forth in letters dated January 14, 1994, and May 17, 1994.

The Court has reviewed the record and the parties' briefing and concludes that the parties have sufficiently briefed the issues to the extent that oral argument will not be helpful. D. Ak LR 7.1(i); *see also United States v. Cheely*, 814 F.Supp. 1430, 1436 n. 4 (D.Alaska 1992) (discussing oral argument in criminal context but principles remain applicable), *aff'd*, 36 F.3d 1439 (9th Cir.1994).

FACTUAL BACKGROUND

On May 24, 1957, Lord filed an Alaska Native Allotment application for a parcel of land on the Tanana River in Fairbanks, Alaska, pursuant to the Alaska Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed 1971). Docket No. 101 at ¶ 4 (third amended complaint). In his application, Lord stated that he had as of May 24, 1957, commenced his occupation of the lands sought in that application. Admin. Rec. Vol. I at 2. The Department of the Interior, Bureau of Land Management ("BLM") sent Lord a notice to his last known address, General Delivery, Fairbanks, Alaska, on January 4, 1963, informing Lord that he needed to send to BLM proof of his use and occupancy of the land by May 24,

1963, to prevent his allotment application from expiring. *Id.* at 12. Lord did not respond. Lord claims that he did not personally receive the notice because it was sent to General Delivery, Fairbanks, Alaska, instead of to the mailbox in Fairbanks at 2 mile Peger Road where Lord was receiving mail at the time. Docket No. 153. Third Aff. of Walter Lord at ¶ 1. The government, however, points out that "General Delivery, Fairbanks, Alaska" was the address used by BLM because Lord put that address on his allotment application. Admin. Rec. Vol. I at 2.

On May 31, 1963, BLM again sent a notice to Lord's last known address, General Delivery, Fairbanks, Alaska, stating that his allotment application had been terminated due to his failure to submit proof of use and occupancy by May 24, 1963, which would have been within six years of the filing of his application. Admin. Rec. Vol. I at 14. The notice was sent by certified mail, and BLM received a return receipt indicating its delivery. *Id.* at 13. The signature on the return receipt was "Etta Mae Lord." *Id.*

In his first affidavit, dated September 23, 1994, Lord stated that he did not personally receive the notice but that his wife, Etta Mae Lord, had "apparently" received it. Docket No. 123, Ex. 2 at ¶ 6 (First Aff. of Walter Lord). Lord further claimed that he was not aware that his wife had received the notice "until as long as many years after it was signed for." *Id.* In an affidavit given on June 3, 1997, Etta Mae Lord stated that she does not recall ever having seen BLM's decision dated May 31, 1963. Docket No. 123, Ex. 7 at ¶ 3 (Aff. of Etta Mae Lord). Lord never appealed the 1963 BLM decision.

In 1971, the Department of the Interior proposed a withdrawal of the land at issue in this case for use as a gravel source by the Alaska Railroad, Department of Transportation. 36 Fed.Reg. 8965-66 (May 15, 1971); Admin. Rec. Vol. III at 52-53. The Alaska Railroad subsequently canceled its application for withdrawal of the lands at issue. 38 Fed.Reg. 18049-50; Admin. Rec. Vol. III at 128-29. As noted in the *Federal Register*, the segregative effect of this cancellation was deemed to have ceased as of 10 a.m. on July 20, 1973.

By letter dated April 20, 1973, the State of Alaska ("State") amended its pending selection to include the lands at issue in this case. Admin. Rec. Vol. V at 14. The State thereafter published notice of this application in the *Fairbanks Daily News-Miner* on five separate occasions in April and May, 1973. *Id.* at 18.

A letter in Lord's handwriting dated August 28, 1973, was sent to the Bureau of Indian Affairs' Land Claims Department. Docket No. 138, Ex. 4 at 6. The letter was date stamped received on August 31, 1973. *Id.* In this letter, Lord stated "I would like to see you very soon in regards to my claim filed in 1957 . . . Since I filed my claim the State of Alaska and the Alaska Railroad have both tryed [sic] to get my land." *Id.*

A decision tentatively approving conveyance of the lands at issue in this case to the State was issued on February 19, 1976. Admin. Rec. Vol. V at 33-34. Subsequently, the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub.L. No. 96-487 (1980) (*codified at* 16 U.S.C. §§ 3101-3233, 43 U.S.C. §§ 1606, 1631-41), was enacted. Pursuant to ANILCA, "all right, title and interest

of the United States" in such lands was deemed to have vested in the State "as of the date of the tentative approval." 43 U.S.C. § 1635(c). On November 12, 1985, the parcel of land sought in Lord's allotment application was patented to the State under patent No. 50-86-0043.

On approximately May 1, 1984, George Tobuk of Tanana Chiefs Conference had a telephone conversation with Kayla Copeland of BLM regarding the status of Lord's allotment application. Admin. Rec. Vol. I at 36, 39. No further communication from or on behalf of Lord was received by BLM until Lord's counsel phoned BLM in December, 1993, and followed up this telephone conversation with a letter dated December 21, 1993. *Id.* at 55. In this letter, Lord's counsel inquired as to "what the status of Mr. Lord's allotment is and whether your office is able to issue the allotment at this time." *Id.*

BLM responded to this inquiry by letter dated January 24, 1994. *Id.* at 56-57. In its response BLM described the history of Lord's allotment application, stated that it had been terminated in 1963 for failure to submit proof of use and occupancy, and stated that the lands sought in Lord's application had subsequently been conveyed to the State. *Id.* at 57. BLM's letter explicitly concluded that "application of F-014623 will remain closed and will not be reinstated." *Id.* at 56.

BLM thereafter received additional correspondence on behalf of Lord from his counsel, *id.* at 62, 65-66, 76, and one telephone call. *Id.* at 68. In this correspondence, Lord's counsel expressed dissatisfaction with BLM's January 24, 1994, letter, argued that Lord was denied due process when his allotment application was terminated,

and further stated that Lord's allotment application was in fact legislatively approved. *Id.* at 65-66. BLM responded by letter dated May 17, 1994. *Id.* at 96-98. BLM's letter stated that "the 'legislative approval' provision of § 905 of ANILCA" was not applicable to Lord's allotment application. *Id.* at 97.

Lord claims that it was only after his attorney received letters from BLM in 1994 that he realized that his application would not be reinstated. Docket No. 123, Ex. 2 at ¶ 7 (First Aff. of Walter Lord). Furthermore, Lord claims that it was not until he received the answer to his initial complaint in the instant case that he realized the United States had conveyed the land to the State. *Id.*

STATUTORY BACKGROUND

In 1887, Congress passed the General Allotment Act, 25 U.S.C. § 334, which provided Indians not living on a reservation or whose tribe did not have a reservation with an opportunity to apply for a 160-acre allotment of unsurveyed and not otherwise appropriated land of the United States. *Shields v. United States*, 504 F.Supp. 1216, 1217 (D.Alaska 1981), *aff'd*, 698 F.2d 987 (9th Cir.), *cert. denied*, 464 U.S. 816 (1983). Because the General Allotment Act was not clear as to whether it applied to Alaska Natives, Congress enacted the Alaska Native Allotment Act which allowed Alaska Natives to make applications for allotments of up to 160 acres. Alaska Native Allotment Act of 1906, 34 Stat. 197, *as amended by* Act of August 2, 1956, 70 Stat. 954; 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed 1971). It was under the Alaska

Native Allotment Act that Lord applied for the allotment which is in dispute in this case.

When applying for allotments, Alaska Natives were required to provide proof that they had used and occupied certain pieces of land for a period of five years. This five year requirement was first promulgated in the regulations in 1938 (43 C.F.R. § 67.13 (1938)). Later, this requirement was included in the Alaska Native Allotment Act when the Act was amended on August 2, 1956, 70 Stat. 954, 43 U.S.C. § 270-3 (1970), to provide that:

> No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

By this amendment, Congress required that an applicant must submit proof of five years use and occupancy in order to be entitled to an allotment. Congress did not, however, provide when proof of use and occupancy must be filed. Instead the statute provided that the Secretary of the Interior could prescribe rules for implementation of the statute. *See* 43 U.S.C. § 270-1 (1970).

The Secretary of the Interior on December 6, 1958, published regulations applicable to Lord's application. 23 *Federal Register* at 9484-85, *codified at*, 43 C.F.R. §§ 67.1 to 67.11 (1963). These regulations provided in part:

> An allotment will not be made until the applicant has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years and the lands are surveyed by the Bureau of Land Management . . .

43 C.F.R. § 67.7 (1963). This proof could be submitted either with the application, if the applicant had by that time already completed the required five years of use and occupancy, or after the filing of the application once the required use and occupancy had been completed. *Id.* The regulations also provided that if an applicant did not file the requisite proof of use and occupancy within six years of the filing of an allotment application, that application was terminated. 43 C.F.R. § 67.5(f). Further, the regulations provided for the situation, such as in this case, where the application was filed prior to publication of the regulations:

> If the application was filed prior to the effective date of this paragraph, the application will be terminated under this paragraph only by decision of the authorized officer after appropriate notice to the applicant, granting him a reasonable time within which to file proof of continuous use and occupancy of the land as required by the regulation in this part.

Id. Since Lord's application was filed on May 24, 1957, the six year period for filing of proof of use and occupancy expired on May 24, 1963.

The Alaska Native Allotment Act was repealed by the Alaska Native Claims Settlement Act ("ANCSA"), Pub.L. No. 92-203, 85 Stat. 688 (1971) (*codified at* 43 U.S.C. §§ 1601-1624). ANCSA extinguished the Native people of Alaska's claims to aboriginal land title, and, in return, federal lands and other consideration were transferred to Alaska Natives. To accomplish this, regional and village corporations were created which were intended to receive the lands conveyed. A number of provisions were

included in ANCSA, however, to protect those with existing rights. For instance, although ANCSA repealed the Alaska Native Allotment Act, there was an exception, or savings clause, for those allotment applications "pending before the Department of the Interior on December 18, 1971." 43 U.S.C. § 1617(a). To further clarify, Congress enacted section 905 of ANILCA on December 2, 1980, which contains a savings clause for allotment applications filed pursuant to the Allotment Act of 1906 that were "pending before the Department of the Interior on or before December 18, 1971." 43 U.S.C. § 1634(a) (generally referred to as "section 905 of ANILCA").

DISCUSSION

I. Summary of Claims

Although Lord's claims all possess a common nucleus of law and fact. Lord's third amended complaint is lengthy, convoluted, and inartfully pled. *See* Docket No. 101 (third amended complaint). For convenience, the Court has broken down Lord's various causes of action as follows:[1]

> First Cause of Action: A challenge to the validity of 43 C.F.R. § 67.5(f) (1963). Third Amended Complaint ¶ 8.

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[1] In its opposition to Lord's motion for summary judgment, the government attempted to identify Lord's various causes of action. *See* Docket No. 138 at 2-4. The Court has examined the government's list, compared it to Lord's third amended complaint, and finds the list to be reliable and accurate. Further, Lord has not challenged the government's list in any subsequent filing with this Court.

Second Cause of Action: Defendants violated the provisions of 43 C.F.R. § 67.5(f). Third Amended Complaint ¶ 9.

Third Cause of Action: Defendants have not adjudicated Plaintiff's entitlement to an allotment pursuant to the Alaska Native Allotment Act, 43 U.S.C. § 270-1 through 270-3 (1970). Third Amended Complaint ¶ 9.

Fourth Cause of Action: Defendants' May 31, 1963, decision to terminate his allotment application was invalid. Third Amended Complaint ¶¶ 10-11.

Fifth Cause of Action: The Secretary of the Interior was required pursuant to section 905 of ANILCA to deem that plaintiff's allotment application was legislatively approved. Third Amended Complaint ¶ 12 and first and second paragraphs 21.

Sixth Cause of Action: If plaintiff's allotment application was not legislatively approved by operation of section 905 of ANILCA, the Secretary of the Interior was nonetheless required pursuant to section 905 to adjudicate plaintiff's entitlement to the allotment sought in that application. Third Amended Complaint ¶¶ 12, 18, 20 and second paragraph 21.

Seventh Cause of Action: The United States had no authority to convey title to the lands sought in plaintiff's allotment application to the State of Alaska. Third Amended Complaint ¶¶ 15-16.

Eighth Cause of Action: To compel defendants to recover the lands sought in his allotment application and reconvey those lands to plaintiff. Third Amended Complaint ¶¶ 17, 20.

Ninth Cause of Action: To quiet title in plaintiff to the lands sought in his allotment application. Third Amended Complaint ¶ 1.

II. Partial Judgment on the Pleadings

Lord alleges that this Court has jurisdiction over this action, in part, pursuant to 28 U.S.C. § 1346(f) and 28 U.S.C. § 2409a, and states that he seeks to "quiet title to an Alaska Native allotment." Docket No. 101 at ¶ 1 (third amended complaint). Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure the government moves for a judgment on the pleadings dismissing Lord's action to quiet title under 28 U.S.C. §§ 1346(f) and 2409a.[2] Docket Nos. 105 (motion), 115 (reply). The motion is opposed. Docket No. 112. Judgment on the pleadings is properly granted when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir.1993).

A party bringing an action in federal court bears the burden of establishing the court's jurisdiction. The United States and its agencies may not be sued, absent a waiver of sovereign immunity. *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471 (1994). Congressional waivers of the sovereign immunity of the United States "must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) (quotations and citations omitted). Therefore, when a party seeks to

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[2] The court has characterized this claim as Lord's Ninth Cause of Action.

sue the United States, that party must establish that Congress has waived sovereign immunity and permitted the suit.

The Quiet Title Act, Pub.L. No. 92-562, 86 Stat. 1176 (*codified at* 28 U.S.C. § 2409a), allows the United States to "be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a). Title 28 U.S.C. § 1346(f) provides that such actions are to be in the district court:

> The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

In other words, 28 U.S.C. § 1346(f) is the jurisdiction-vesting counterpart to 28 U.S.C. § 2409a's waiver of sovereign immunity.

The government argues that while the United States waives sovereign immunity pursuant to the Quiet Title Act, that waiver is provided only with respect "to real property in which the United States claims an interest," 28 U.S.C. § 2409a(a), or with respect to "an estate or interest in real property in which an interest is claimed by the United States." 28 U.S.C. § 1346(f). The government takes the position that since the United States has already conveyed full title and interest in the lands at issue in this case to the State, it no longer has a claim to the property. This argument is bolstered by the fact that both this Court and Lord, in earlier proceedings and briefings, have

repeatedly acknowledged that any interest the United States had in the property has been conveyed to the State. *See, e.g.*, Docket Nos. 101 at 5 (third amended complaint), 77 at 3 (order denying defendants' motion to dismiss). In order for the Quiet Title Act to apply, the plaintiff must set forth the "right, title or interest claimed by the United States." 28 U.S.C. § 2409a(d). As this element is completely lacking in Lord's pleadings, the government soundly concludes that this Court lacks jurisdiction over any claim against the United States under the Quiet Title Act. *See Bay Sav. Bank, F.S.B. v. Internal Revenue Serv.*, 837 F.Supp. 150, 154 (E.D.Va.1993) ("where the property at issue has been sold, the government no longer 'claims an interest' and section 2409a is not applicable.") (citations omitted).

In opposition to the government's motion for partial judgment, Lord contends that where the government has deprived an individual of his property by administrative wrongdoing, the government cannot avoid this Court's jurisdiction by disposing of the property. *See Donnelly v. United States*, 850 F.2d 1313, 1318 (9th Cir.1988). However, in *Donnelly*, the Ninth Circuit Court of Appeals did not find that it had jurisdiction to quiet title under statutes other than 28 U.S.C. § 2409a. Rather, the Ninth Circuit merely held that the fact that the title of the United States had already been conveyed to a third party did not preclude review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, of the propriety of adverse administrative action. *Id.* In its motion for partial judgment on the pleadings, the government is not seeking dismissal of Lord's claim for review of BLM's administrative action. The government seeks dismissal only of that portion of

Lord's third amended complaint which seeks a judgment quieting title between Lord and the United States.[3]

As an alternative argument, Lord asserts that even if the conveyance of the property to the State bars jurisdiction under the Quiet Title Act, this Court has jurisdiction of Lord's quiet title claim pursuant to 5 U.S.C. § 702, and under 25 U.S.C. § 345. However, the Quiet Title Act is the exclusive means by which a party may seek to quiet title as against the United States. *Block v. North Dakota*, 461 U.S. 273, 286 (1983); *State of Alaska v. Babbitt*, 75 F.3d 449, 452 (9th Cir.), *cert. denied*, 117 S.Ct. 70 (1996); *Gardner v. Stager*, 103 F.3d 886, 888 (9th Cir.1996), *cert. denied*, 118 S.Ct. 54 (1997). Therefore, 5 U.S.C. § 702 and 25 U.S.C. § 345 do not provide this Court with subject matter jurisdiction over a quiet title action against the United States.

Jurisdiction under the Quiet Title Act lies only "to adjudicate a disputed title to real property in which the United States claims an interest. . . . " 28 U.S.C. § 2409a(a). The United States claims no interest in the property at issue in this case. Therefore, the government's motion for judgment on the pleadings is granted.

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[3] Moreover, *Donnelly* is inapplicable because the conveyance of the property at issue in this case was not made by an administrative action of the Executive (as was the case in *Donnelly*), but was a legislative conveyance made by Congress (i.e., all title and interest of the United States in land sought in Lord's allotment application was conveyed to the State as of February 19, 1976, by Congress). Actions of Congress are not reviewable under the Administrative Procedure Act. 5 U.S.C. § 701(b)(1)(A).

III. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir.1985); FED.R.CIV.P. 56. Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Id.* In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party. *Id.*

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IV. Operation of the Statute of Limitations

The government moves for partial summary judgment dismissing six of Lord's eight remaining causes of action as barred by the applicable six year statute of limitations.[4] The government's arguments are set forth in two different motions. First, the government moves for partial summary judgment dismissing Lord's action insofar as Lord challenges the validity of 43 C.F.R. § 67.5(f) (1963).[5] Docket Nos. 107 (motion), 129 (reply). The

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[4] As previously mentioned, the Court determined in an earlier Order that the six year statute of limitations set out in 28 U.S.C. § 2401(a) applies to this case.

[5] The court has characterized this claim as Lord's First Cause of Action.

motion is opposed. Docket No. 123. Second, the government moves for partial summary judgment dismissing what the Court has characterized as Lord's Second, Third, Fourth, Seventh and Eighth causes of action. Docket Nos. 137 (motion), 162 (reply). Again, the motion is opposed. Docket No. 154.

A. Lord's Challenge to the Validity of 43 C.F.R. § 67.5(f)

Lord alleges that "[t]he regulations contained at 43 C.F.R. § 67.5(f) exceed and are contrary to the statutory authority of the Department of the Interior and are otherwise null and void." Docket No. 101 at ¶ 8 (third amended complaint). There currently is no regulation codified at 43 C.F.R. § 67.5(f). The regulation to which Lord is referring was contained in regulations published in 23 *Federal Register* at 9484-85 (Dec. 6, 1958), *codified at*, 43 C.F.R. § 67.1 to 67.11 (1959). Section 67.5(f) provided that if an applicant did not file the requisite proof of use and occupancy within six years of the filing of an allotment application, "[the applicant's] application for allotment will terminate without affecting the rights of the applicant gained by virtue of his occupancy of the land, or his rights to make another application." 43 C.F.R. § 67.5(f) (1963). Further, the regulations provided for the situation, such as in this case, where the application was filed prior to publication of the regulations:

> If the application was filed prior to the effective date of this paragraph, the application will be terminated under this paragraph only by decision of the authorized officer after appropriate

> notice to the applicant, granting him a reasonable period within which to file proof of continuous use and occupancy of the land as required by the regulation in this part.

Id.[6]

A cause of action accrues when the plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir.1990). Any challenge to § 67.5(f) is subject to the six year statute of limitations found in 28 U.S.C. § 2401(a). *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir.1988). The Ninth Circuit Court of Appeals addressed the issue of when this statute of limitations commences to run with respect to federal regulations in *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715-16 (9th Cir.1991). As stated in that decision:

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[6] Lord proposes a unique reading of § 67.5(f). Relying upon the phrase "without affecting the rights of the applicant gained by virtue of his occupancy of the land or his rights to make another application," Lord contends that BLM's actions in 1963 did not "adversely affect" his rights, and asserts that there was no basis for filing an appeal. *See* Docket No. 123 at 13-14 (opposition). Lord argues that instead, consistent with the regulations, he retained his preference rights to the allotment, relating back to the date of his initial entry in 1957. *See State of Alaska v. Babbitt*, 38 F.3d 1068, 1073, 1075-76 (9th Cir.1994). Lord's reading of § 67.5(f) is contrary to the regulation's plain meaning and would render the regulation virtually meaningless. Moreover, BLM's 1963 notice of termination letter expressly stated "the application for allotment is terminated." Admin. Rec. Vol. I at 14.

> If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to bring a policy based facial challenge to the government's decision, that too must be brought within six years of the decision.

Id. at 715. If, however, a plaintiff wishes to challenge the substance of a decision as exceeding constitutional or statutory authority, "[t]he challenge must be brought within six years of the agency's application of the disputed decision to the challenger." *Id.* at 715-16.[7] It appears to be the latter challenge (exceeding statutory authority) which Lord wishes to make.

The government argues that delivery of BLM's May 31, 1963, decision to Lord's wife was proper. Pursuant to the regulations of the United States Post Office, Lord's wife was an authorized agent upon whom delivery of this notice could lawfully be made. 39 C.F.R. §§ 44.2, 58.5 (1962); 39 C.F.R. §§ 44.2, 58.5 (1966). The government asserts that these Post Office regulations are substantive in nature and thus create law. *See Southern California Edison Co. v. Federal Energy Regulatory Comm'n*, 770 F.2d 779, 783 (9th Cir.1985). Therefore, as a matter of federal law, Lord's wife was his agent. Actual notice to a party's agent is actual notice to that party. *Morrow Crane Co. v.*

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[7] In other words, any challenge to a procedural violation in the adoption of a regulation must be brought within six years of the adoption of the regulation, and any substantive challenge to a regulation must be brought within six years of application of the regulation to the party wishing to challenge the regulation.

Affiliated FM Ins. Co., 885 F.2d 612, 614-15 (9th Cir.1989). Accordingly, the government argues that Lord was provided with actual notice of his allotment application's termination by June, 1963, and any challenge by Lord to § 67.5(f) should have been raised within six years of that notice.

Lord contends that the government failed to provide him with actual notice of the various actions taken concerning his allotment, thereby violating due process and mandating the tolling of any statute of limitations. *See* Docket No. 123 at 14-19 (opposition). Due process normally requires notice and an opportunity to be heard. Where any proceeding will finally determine a person's property rights, he is entitled to notice reasonably calculated, under all of the circumstances, to apprise him of the pendency of the proceeding and an opportunity to present his claim or objections. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 484 (1988). What is "reasonable notice" depends upon all of the circumstances and requires a delicate balancing of the people's interest in a final resolution of disputes and the claimant's right to protect his properly. *Id.*; *see also Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

Lord relies upon *Ogle v. Salamatof Native Ass'n, Inc.*, 906 F.Supp. 1321 (D.Alaska 1995), to support his position. In *Ogle*, this Court stated that "[a]ctual notice is required as a precondition to a proceeding which will adversely affect the property interests of any party if its name and address are reasonably ascertainable." *Ogle*, 906 F.Supp. at 1327. Lord asserts that BLM's May 31, 1963, decision did not inform him of any right to appeal or otherwise request a hearing, and further asserts that BLM failed to

follow its own regulations concerning pre-deprivation notice. *See* Docket No. 123 at 15-16 (opposition).

However, BLM's decision expressly stated that Lord's allotment application was terminated:

> Accordingly, the application for allotment is terminated and the case file closed of record in this office. This decision does not affect the rights of applicant to make another application (43 CFR 67.5(f)).

Admin. Rec. Vol. I at 14. The decision also expressly set forth the grounds upon which it was based. *Id.* Moreover, pursuant to the published regulations applicable at that time, Lord had a right to an administrative appeal of the decision first to the Director of BLM, 43 C.F.R. §§ 67.9, 221.1 (1963), and from the Director of BLM to the Secretary of the Interior, 43 C.F.R. § 221.31 (1963). BLM's decision was also suspended during the time period in which an appeal could be filed, and during the pendency of an appeal, if filed. 43 C.F.R. § 221.101 (1963).[8]

This Court's ruling in *Ogle* is readily distinguishable from the present situation. *Ogle* does not decide whether something other than notice delivered by mail is required

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[8] It is true that BLM's decision did not explicitly notify Lord of his right to an administrative appeal. However, Lord had notice of that right by publication of the regulations in the *Federal Register*. *See Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir.1990) (publication in the *Federal Register* "is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance"); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir.1984) (publication in the *Federal Register* "constituted formal notice to the world").

in the situation present in this case, but merely left that question open for further consideration. *Ogle*, 906 F.Supp. at 1330. Also, *Ogle* involved notice published in the newspaper or posted at the Post Office; it did not involve receipt of an agency decision by an authorized agent of the plaintiff. *Id.* at 1329-30.

Actual notice by mail is sufficient to meet the requirements of due process:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Mennonite Board of Missions, 462 U.S. at 800 (emphasis in original). In this instance, there is no record indicating that Lord ever notified BLM that he had a new and different address prior to May 31, 1963. The procedure employed by the Department of the Interior with respect to BLM's May 31, 1963 decision: (1) set forth the basis of BLM's decision to terminate Lord's allotment application; (2) provided for an administrative appeal following which the termination of Lord's allotment application would become final; (3) provided an opportunity for hearing on any issue of fact pertaining to the termination of Lord's allotment application; and (4) sent notice to Lord at his last known address in a manner in which the decision was to be delivered only to Lord or an authorized agent for Lord. This procedure was reasonably calculated to provide Lord with notice of BLM's action.

Lord received through his authorized agent BLM's May 31, 1963, decision terminating his allotment application. As a matter of law, Lord therefore had actual notice of the application of § 67.5(f) to his allotment application by June, 1963. The time for the filing of any challenge to the validity of § 67.5(f) by Lord expired in June, 1969. Lord's attempt to challenge that regulation in this action (which was not filed until 1994) is barred by operation of 28 U.S.C. § 2401(a).

B. Lord's Second, Third, Fourth, Seventh and Eighth Causes of Action

The government also moves for partial summary judgment dismissing Lord's Second, Third, Fourth, Seventh and Eighth causes of action as barred by the six year statute of limitations. Docket Nos. 137 (motion), 162 (reply).[9] The motion is opposed. Docket No. 154. The primary difference between the arguments presented in this motion, and the argument discussed in Section IVA of this Order, is that the government incorporates a broader discussion of the factual circumstances which constitute the history of this case into its motion. In other words, instead of simply arguing that Lord had actual knowledge in June of 1963, the government discusses

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[9] The government's motion also applies the twelve year statute of limitations contained in 28 U.S.C. § 2409a(g) to Lord's Quiet Title Act claim. *See* Docket No. 138 at 9-25 (motion). A ruling on this aspect of the motion is unnecessary in view of the Court's conclusion that it lacks jurisdiction to hear Lord's Quiet Title Act claim. The government also reiterates its argument that review of Lord's challenge to the validity of 43 C.F.R. § 67.5(f) is barred by operation of 28 U.S.C. § 2401(a).

various different times where it contends that Lord had notice of the action taken by the government concerning his allotment application.

In view of the Court's conclusion that Lord had actual notice of BLM's May 31, 1963, termination letter, it is not necessary to extensively debate whether Lord was provided with notice of the status of his allotment application at the various stages described by the government. If Lord was provided with actual notice of his allotment application's termination in June, 1963, then it is clear that Lord's Second, Third and Fourth causes of action are also barred by the six year statute of limitations.

In Lord's Seventh Cause of Action, he alleges that the government had no authority to convey title to the lands sought in his allotment application to the State, and in his Eighth Cause of Action, Lord requests that the Court compel the government to recover the lands sought in his allotment application and reconvey those lands to Lord. Both of these claims are also barred by the six year statute of limitations. By December 2, 1980, Lord knew or should have known that the lands at issue in this case had been conveyed to the State. Lord is presumed to have known of the statute which legislatively approved conveyance by Congress of all prior tentative approvals of State selections in 43 U.S.C. § 1635(c)(1). *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-385 (1947) ("everyone is charged with knowledge of the United States Statutes at Large"); *see also United States v. Markgraf*, 736 F.2d 1179, 1185 (7th Cir.1984), *cert. dismissed*, 469 U.S. 1199 (1985). Any claim challenging the land conveyance should have been

brought within six years of the property's conveyance to the State.[10]

C. Tolling of the Statute of Limitations

Lord strenuously argues that the statute of limitations should be tolled in this case. The parties have extensively briefed the issue, and discussion of the matter is warranted. Lord invokes parts of three separate and distinct doctrines: equitable tolling, equitable estoppel, and tolling by fraudulent concealment.

1. Equitable Tolling

The doctrine of equitable tolling is properly utilized where without the fault of either party, the plaintiff did not, and could not with due diligence have obtained enough information to sue within the period of the statute of limitations. *In re United Ins. Management, Inc.*, 14 F.3d 1380, 1384 (9th Cir.1994). The Ninth Circuit has made clear that one who fails to act diligently cannot invoke equitable principles to excuse lack of diligence. *Id.* at

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[10] Moreover, this Court does not appear to have the authority to grant the relief requested in Lord's Eighth Cause of Action. Neither the Secretary of the Interior nor the Department of the Interior has any authority to initiate litigation. That authority lies with the Attorney General of the United States. 28 U.S.C. § 516. Even assuming for the purpose of argument that a fiduciary relationship exists between the government and Lord, that relationship appears insufficient by itself to create a mandatory duty to initiate litigation. *See United States v. Mitchell*, 463 U.S. 206, 224, 217-18 (1983) (holding that the General Allotment Act created a "bare trust").

1386. Lord received actual notice of BLM's 1963 termination decision by virtue of the decision's delivery to his wife, Lord's authorized agent. As the Court has previously stated, BLM's termination decision clearly set forth the grounds upon which it was based, afforded Lord an opportunity to appeal, and clearly stated that Lord's application was terminated. Therefore, by his failure to contest or appeal BLM's decision, Lord failed to act diligently and is precluded from utilizing the doctrine of equitable tolling. *See, e.g., Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380, 384-85 (9th Cir.), *cert. denied*, 118 S.Ct. 158 (1997).

2. Equitable Estoppel

The Ninth Circuit has distinguished between equitable tolling and equitable estoppel by stating that "equitable tolling applies when the plaintiff is unaware of his cause of action, while equitable estoppel applies when a plaintiff who knows of his cause of action reasonably relies on the defendant's statements or conduct in failing to bring suit." *Stitt v. Williams*, 919 F.2d 516, 522 (9th Cir.1990). Typically, a plaintiff attempts to utilize either the doctrine of equitable tolling or the doctrine of equitable estoppel. However, in his third affidavit, Lord states that he understood that the Bureau of Indian Affairs ("BIA") would file proof of his use and occupancy on his behalf. Docket No. 153, Third Aff. of Walter Lord at ¶¶ 7, 14. Lord further alleges that he was also told by BIA that he had nothing to worry about with respect to his allotment application. *Id.* at ¶ 10. Lord's allegations at least arguably implicate the doctrine of equitable estoppel.

Assuming that the doctrine of equitable estoppel can be applied to the United States,[11] application of that doctrine requires that the plaintiff must first show the following traditional elements of estoppel:

> (1) knowledge of the true facts by the party to be estopped; (2) intent to induce reliance or actions giving rise to a belief in that intent; (3) ignorance of the true facts by the relying party; and (4) detrimental reliance.

Bolt v. United States, 944 F.2d 603, 609 (9th Cir.1991) (citing *Watkins v. United States Army*, 875 F.2d 699, 709 (9th Cir.1989) (*en banc*), *cert. denied*, 498 U.S. 957 (1990)); *see also Jaa v. United States Immigration & Naturalization Serv.*, 779 F.2d 569, 571 (9th Cir.1986). Where a party is asserting estoppel against the government, it must also show that the government's actions have amounted to affirmative misconduct. *Gilmore v. Lujan*, 947 F.2d 1409, 1412 (9th Cir.1991); *Bolt*, 944 F.2d at 609; *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1347 (9th Cir.1990); *Mukherjee v. Immigration & Naturalization Serv.*, 793 F.2d 1006, 1008 (9th Cir.1986). A mere mistake does not rise to the level required for estoppel. *Mukherjee*, 793 F.2d at 1009.

Lord has not satisfied the basic requirements for invocation of the doctrine of equitable estoppel. First, the representations Lord relies on were made by personnel within BIA. The responsibility for the processing and

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[11] Whether this doctrine can apply to the United States is an issue which has not yet been decided. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 423-24, *rehearing denied*, 497 U.S. 1046 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).

adjudication of Alaska Native Allotment Act applications lay with BLM, not BIA. *See* 43 C.F.R. Part 67 (1963). Therefore, BIA did not have the authority to make any assurances about the status of Lord's allotment application. *See Saulque v. United States*, 663 F.2d 968, 976 (9th Cir.1981) ("It is well settled that estoppel cannot be invoked against the government because of the unauthorized acts of its agents."). BIA's role was limited to certifying whether the applicant was a Native and thus qualified to make an application under the Alaska Native Allotment Act. 43 C.F.R. § 67.5(e) (1963). Any statements which may have been made by BIA, therefore, cannot be used to support a claim of equitable estoppel. Moreover, even if the alleged representations were made by BIA, they certainly do not rise to the level of affirmative misconduct required for any estoppel to lie against the government. *See, e.g., Mukherjee*, 793 F.2d at 1009 (holding as a matter of law that the government actions at issue fell short of the affirmative misconduct necessary for estoppel).

3. Tolling by Fraudulent Concealment

Finally, Lord also presents a tolling by fraudulent concealment argument. According to Lord, "it turns out that BLM was actually engaged in a secretive internal agency review of prior closed allotment files . . . a clandestine administrative process that has continued into the 1990s." Docket No. 154 at 9 (opposition). Lord contends that the statute of limitations was tolled by reason of this fraudulent concealment. *Id.* at 23, 29-30.

The secretive internal agency review which Lord alleges is somewhat difficult to concisely describe. Lord points to various discovery items provided by the government which indicate that a series of administrative reviews were conducted on Lord's Native Allotment application subsequent to BLM's May 31, 1963, termination notice. *See* Docket No. 154 at 9-14 (opposition). The government does not contest the assertion that it has reviewed Lord's allotment application file on several different occasions since May 31, 1963. Rather, the government maintains that there was nothing clandestine about these reviews, but that they were undertaken as a voluntary action by BLM to go back through its files and determine if various changes in the law or policy were applicable to Lord's application. *See* Docket No. 138 at 19-22 (motion). The government maintains that if it had been determined that Lord's application was required to be reinstated or further adjudication required, Lord would have received notice thereof.

To prevail on a claim of fraudulent concealment, Lord must allege with particularity facts in his complaint showing the circumstances of the alleged concealment. *Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir.), *cert. granted*, 116 S.Ct. 2521 (1996), *cert. dismissed*, 117 S.Ct. 759 (1997); *see Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 120 (9th Cir.1980) ("The plaintiff must plead with particularity the circumstances surrounding the fraudulent concealment and state facts showing his due diligence in trying to uncover the facts.") (citation and internal quotation omitted); *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir.1993) (failure to plead facts with particularity requires dismissal). Lord's third amended complaint is devoid of

any reference to the government's alleged fraudulent concealment. *See* Docket No. 101 (third amended complaint). This fact alone precludes the possibility of this Court's tolling the statute of limitations on the basis of Lord's fraudulent concealment claim. *See Grimmett*, 75 F.3d at 514; *Conerly*, 623 F.2d at 120; *Neubronner*, 6 F.3d at 672. Furthermore, Lord's tolling by fraudulent concealment argument loses on the merits as well. *See Grimmett*, 75 F.3d at 514-15 (dismissing plaintiff's tolling by fraudulent concealment argument on the merits); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir.1987) ("The doctrine [of fraudulent concealment] is properly invoked only if a plaintiff establishes 'affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief' ") (citation omitted). The allegedly concealed reviews were contained within public records to which Lord had access. At most, BLM only failed to give Lord notice of these reviews; it did not conceal them. *See Grimmett*, 75 F.3d at 514 (plaintiff must both plead and prove that defendants actively misled her).

V. Lord's Claims Under the Administrative Procedure Act

Finally, the government moves for partial summary judgment dismissing Lord's claims (1) that the Secretary of the Interior was required pursuant to section 905 of ANILCA to deem that Lord's allotment application was legislatively approved, and (2) that if Lord's allotment application was not legislatively approved, the Secretary

of the Interior was required pursuant to section 905 of ANILCA to adjudicate Lord's entitlement to the allotment sought in that application.[12] Docket Nos. 143 (motion), 171 (reply). The motion is opposed. Docket No. 159.

The government presents two distinct arguments in its effort to dispose of these two outstanding claims. First, the government points out that by letters dated January 24, 1994, and May 17, 1994, BLM unequivocally stated that Lord's allotment application was not subject to the legislative approval provisions of section 905 of ANILCA. The government argues that judicial review of BLM's 1994 determinations is barred for lack of finality by reason of Lord's failure to exhaust administrative remedies. That is, Lord was obligated to appeal BLM's decision to the Interior Board of Land Appeals ("IBLA"), and absent such an appeal this Court lacks jurisdiction to hear Lord's claims. Second, the government argues that even if Lord's claims are not so barred, BLM's determinations must be sustained as a matter of law.

The Court is not convinced that it lacks jurisdiction to hear these claims by reason of Lord's failure to exhaust administrative remedies. Under the Administrative Procedure Act, the challenged agency action must be "final" before it can be subject to judicial review. 5 U.S.C. § 704; *Clouser v. Espy*, 42 F.3d 1522, 1531-32 (9th Cir.1994), *cert. denied, Clouser v. Glickman*, 515 U.S. 1141 (1995). However, the Ninth Circuit Court of Appeals has made clear that even if the doctrine of exhaustion suggests that further

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[12] The Court has characterized these claims as Lord's Fifth and Sixth Causes of Action.

administrative review would have been appropriate, a court can decline to order such review under certain circumstances:

> [W]here the agency's position on the question "appears already set," and it is "very likely" what the result of recourse to administrative remedies would be, such recourse would be futile and is not required.

Clouser, 42 F.3d at 1533 (quoting *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir.1991)). As the government itself has stated in its motion, the Secretary of the Interior has taken the firm position that Lord's application was not legislatively approved. *See* Docket No. 143 at 14-15 ("The Secretary of the Interior interprets 43 U.S.C. § 1634(a)(1) as not approving applications for land which were legislatively conveyed to the State of Alaska by 43 U.S.C. § 1635(c)"). Because IBLA's position on legislative approval and section 905 of ANILCA "appears already set," recourse to administrative remedies would be futile and will not be required.

However, it appears that BLM's determinations should be sustained as a matter of law. There is no dispute that by section 905(a) of ANILCA Congress legislatively approved certain Alaska Native Allotment Act applications. ANILCA provides in relevant part:

> Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971, . . . are

> hereby approved on the one hundred and eightieth day following December 2, 1980 . . .

43 U.S.C. § 1634(a)(1). The legislative history of this part of ANILCA states:

> An amendment to Section 905 clarifies that the purview of the section includes all Alaska Native allotment applications which were pending before the Department of the Interior on "or before" December 18, 1971. The amendment clarifies that applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section.

S.Rep. No. 413, 96th Cong., 1st Sess. 238 (1979). Lord argues that his application was erroneously rejected because it was rejected without a hearing and because BLM did not follow its own handbook and allow him until 1964 to file his proof of use and occupancy. Lord also cites to several IBLA decisions where IBLA reinstated "statutory life" terminations. Docket No. 154 at 24-27; *see, e.g., Heirs of Edward Peter*, 122 IBLA 109 (1992).

The government argues that Lord's application was not legislatively approved because it was properly terminated prior to December 18, 1971. According to the government, the termination was proper without a hearing because Lord's application was rejected as a matter of law. *See Pence v. Andrus*, 586 F.2d 733, 739-40 (9th Cir.1978) (*Pence II*). In other words, a hearing was not required because there were no factual disputes; Lord simply failed to file proof of occupancy within the

agency's statutory period and that was the sole reason for his application's termination.

In addition, or in the alternative, the government argues that section 905 of ANILCA is not applicable to lands conveyed to the State. According to the government, there can be no dispute that by operation of 43 U.S.C. § 1635(c) the full title and interest of the United States in the lands at issue was conveyed to the State as of February 19, 1976.[13] The government encourages the Court to conclude as a matter of law that the United States had no interest in the land at issue in this case to which legislative approval could attach upon ANILCA's passage.

The government's motion for partial summary judgment is granted as to Lord's Fifth Cause of Action: the Secretary of the Interior was not required pursuant to section 905 of ANILCA to deem that Lord's allotment application was legislatively approved. Lord's allotment

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[13] 43 U.S.C. § 1635(c)(1) provides "all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval. . . . " ANILCA does not address the issue of whether 43 U.S.C. § 1634(a) is applicable to lands conveyed to the State by § 1635(c)(1). However, the Secretary of the Interior interprets § 1634(a)(1) as not approving applications for land which were legislatively conveyed to the State by § 1635(. Elizabeth G. Cook, Eya Osterhaus, 90 IBLA 152, 155 (Dec. 30, 1985). The government asserts that the Secretary's interpretation is reasonable and that this Court must therefore give deference to the agency's interpretation. *Rust v. Sullivan*, 500 U.S. 173 (1991); *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir.1990).

application was not legislatively approved because it was not pending before the Department of the Interior on or before December 18, 1971. The allotment application was properly terminated in 1963 because Lord failed to file proof of his use and occupancy.[14]

In his Sixth Cause of Action, Lord asserts that even if his allotment application was not legislatively approved, the Secretary of the Interior was nonetheless required pursuant to section 905 of ANILCA to adjudicate Lord's entitlement to the allotment. The Ninth Circuit Court of Appeals has recognized that 43 U.S.C. § 1634(a) does not require the Secretary of the Interior to "*re*adjudicate those applications which were already adjudicated under the [Alaska Native Allotment Act]." *Silas v. Babbitt*, 96 F.3d 355, 358 (9th Cir.1996) (italics in original). After a brief discussion regarding Congress' intent in enacting section 905 of ANILCA, the Court of Appeals further stated: "[w]e hold that Section 905(a) of ANILCA does not mandate the reopening of applications previously adjudicated under the [Alaska Native Allotment Act]." *Id.* at 358-59. Thus, it is clear that section 905 of ANILCA does not apply to allotment applications which were adjudicated prior to the enactment of that statute.

An adjudication of Lord's allotment application was conducted and completed by the Department of the Interior on May 31, 1963. Lord's only Alaska Native Allotment application was terminated and closed by BLM in 1963 as a matter of law for failure to submit any evidence

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[14] This conclusion obviates any need to rule upon the government's alternative ground for dismissal of this claim.

of actual use and occupancy. Therefore, the Secretary of the Interior was not required to readjudicate Lord's entitlement to the allotment pursuant to the passage of ANILCA.

CONCLUSION

Lord's action is dismissed in its entirety. There are no remaining causes of action for further litigation in this Court.

IT IS THEREFORE ORDERED:

Defendants' motion for partial judgment on the pleadings at **Docket No. 105** is **GRANTED**. Defendants' motion for partial summary judgment at **Docket No. 107** is **GRANTED**. Defendants' motion for partial summary judgment at **Docket No. 143** is **GRANTED**.

Defendants' motion for partial summary judgment at **Docket No. 137** is **GRANTED IN PART AND DENIED IN PART**. The motion is granted as to Lord's Second, Third, Fourth, Seventh and Eight [sic] Causes of Action. The motion is moot and therefore denied as to Lord's First and Ninth Causes of Action.

Plaintiff's motion for summary judgment at **Docket No. 123** is **MOOT and therefore DENIED**. Defendants' motion for partial summary judgment at **Docket No. 142** is **MOOT and therefore DENIED**. Defendants' motion in limine at **Docket No. 144** is **MOOT and therefore DENIED**. Defendants' motion for partial summary judgment at **Docket No. 151** is **MOOT and therefore DENIED**. Plaintiff's motion for summary judgment at **Docket No. 153** is **MOOT and therefore DENIED**.

Dated at Anchorage, Alaska, this 5 day of November, 1997.

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WALTER LORD, Plaintiff, vs. BRUCE BABBITT, Secretary of the United States Department of the Interior, and THE UNITED STATES OF AMERICA, Defendants.	Case No. F94-0011 CV (JKS) **JUDGMENT IN A CIVIL CASE** (Filed Nov. 6, 1997)

__ **JULY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT Walter Lord's claims against all defendants are **DISMISSED WITH PREJUDICE.**

APPROVED:

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

11/6/97
Date

MICHAEL D. HALL
Clerk

Patricia Demeter
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WALTER LORD, Plaintiff, vs. BRUCE BABBITT, Secretary of the United States Department of the Interior, and THE UNITED STATES OF AMERICA, Defendants.	Case No. F94-0011 CV (JKS) **AMENDED ORDER** (Filed Jan. 20, 1998)

On November 5, 1997, this Court entered an Order dismissing this case in its entirety. Docket No. 179. A judgment based upon that Order was subsequently entered. Docket No. 180. Walter Lord ("Lord") has filed a motion for reconsideration. *See* Docket No. 181 (motion for reconsideration and for new trial).[1] Lord seeks reconsideration on three bases. First, Lord argues that the Court has improperly weighed the evidence and made credibility determinations, this being contrary to the summary judgment standard set forth in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Second, Lord argues that the Bureau of Land Management's ("BLM") decision

[1] Pursuant to Rule 59 of the Federal Rules of Civil Procedure, Lord also moves for a new trial. The motion for a new trial will be disregarded. Rule 59 is only properly invoked after a trial by jury or a trial by court. *See* FED. R. CIV. P. 59(a). In this case, all matters have been decided at a pretrial stage. *See* FED. R. CIV. P. 56

of May 31, 1963, is not entitled to administrative finality for the purposes of the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487 (1980). Third, Lord argues that even assuming he received BLM's decision of May 31, 1963, and that such receipt satisfies any post deprivation due process concerns, the Court has not addressed Lord's contention that due process was violated because Lord did not receive the pre-deprivation due process that was required by the applicable BLM regulations, and that is required by the Constitution.

DISCUSSION

1. Did the Court improperly weigh the evidence?

Lord acknowledges that there does not appear to be a factual dispute that a return receipt for the envelope that BLM contends contained its May 31, 1963, decision terminating Lord's allotment application was signed by Etta Mae Lord. Docket No. 181 at 2. However, Lord contends that there is a genuine issue of material fact as to what Etta Mae Lord signed for. Phrased somewhat differently, Lord argues that there is a genuine issue of material fact regarding whether the certified mail for which Etta Mae Lord signed contained BLM's May 31, 1963 decision, or some other document, or nothing at all.

Etta Mae Lord, in her affidavit, states that she does not "recall ever seeing" BLM's decision. In ¶ 6 of his first affidavit, Lord expressly states that BLM's decision of May 31, 1963, "was apparently received by my wife Etta Mae Lord. I was not aware that my wife had received this correspondence until as long as many years after it was signed for by my wife . . . " The government has provided

a declaration from a BLM Land Law Examiner (James F. Moore) stating that the letter was mailed to Lord on May 31, 1963, in accordance with BLM procedure. A copy of the termination letter is included in the administrative record.

Lord has produced no credible evidence suggesting an inference that the envelope was empty, or that it contained some other piece of correspondence. Lord's first affidavit clearly implies that the certified mail signed for by Etta Mae Lord contained the letter. Etta Mae Lord's affidavit of June 3, 1997, in which she states that she does not "recall" ever having seen the letter does not raise a genuine issue of fact. More than thirty years after the fact, it is to be expected that Etta Mae Lord does not recall having seen the letter. Finally, the government has provided a thorough and complete administrative record which clearly reveals that the termination decision of May 31, 1963, was mailed to Lord by certified mail and that this was the only piece of correspondence sent to Lord on that date.

In his motion for reconsideration, Lord cites to *Nunley v. City of Los Angeles*, 52 F.3d 792, 795-96 (9th Cir. 1995). In *Nunley*, the Court of Appeals interpreted Federal Rule of Appellate Procedure 4(a)(6). Rule 4(a)(6) provides for an extension of time to file notice of appeal upon a showing that the would be appellant did not receive notice of the entry of judgment and that no other party would be prejudiced by the extension. Lord directs the Court's attention to the following statement: "When a movant specifically denies receipt of notice, a district judge must then weigh the evidence and make a considered factual determination concerning receipt, rather than

denying the motion out of hand based upon proof of mailing." *Id.* at 796. This statement is inapposite to the circumstances of this case for two obvious reasons. First, the Court is not basing its decision in this case upon proof of mailing, the Court is basing its decision upon proof of receipt. Second, the court in *Nunley* expressly stated that "actual receipt is difficult to show without using certified mail." *Id.*

In this case, certified mail was used and Etta Mae Lord signed for the mail. There is no evidence to support Lord's counsel's newly raised contention that the envelope was empty, or perhaps contained something else. While certified mail may not be a foolproof method, it was one of the most reliable alternatives available to the government, and the government complied with the required procedure of documenting receipt. The Court concludes that this is not a genuine issue of material fact, and that the Court did not improperly weigh the evidence.

2. Was BLM's decision entitled to administrative finality?

Lord next contends that the Court's decision to give administrative finality to BLM's May 31, 1963, decision is contrary to agency practice as evidenced in the Interior Board of Land Appeals ("IBLA"), which holds that for the purposes of ANILCA a document does not constitute a valid, appealable decision and is thus not entitled to administrative finality where the document fails to inform the applicant of his right to appeal and how to exercise that right. *See Heirs of Alexander Williams,* 121

IBLA 224, 231-33 (1991). If BLM's decision was not entitled to administrative finality, then Lord contends that his application must be deemed pending on or before December 18, 1971, for the purposes of ANILCA.

This is not a new argument. Lord raised this point in various briefs submitted to the Court and the argument was rejected. BLM's decision expressly stated that Lord's allotment application was terminated:

> Accordingly, the application for allotment is terminated and the case file closed of record in this office. This decision does not affect the rights of applicant to make another application (43 CFR 67.5(f)).

Admin. Rec. Vol. I at 14. The decision also expressly set forth the grounds upon which it was based. *Id.* Moreover, pursuant to the published regulations applicable at that time, Lord had a right to an administrative appeal of the decision first to the Director of BLM, 43 C.F.R. §§ 67.9, 221.1 (1963), and from the Director of BLM to the Secretary of the Interior, 43 C.F.R. § 221.31 (1963). BLM's decision was also suspended during the time period in which an appeal could be filed, and during the pendency of an appeal, if filed. 43 C.F.R. § 221.101 (1963). While it is true that BLM's decision did not explicitly notify Lord of his right to an administrative appeal, the Court concluded that Lord had notice of that right by publication of the regulations in the *Federal Register. See Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) (publication in the *Federal Register* "is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance"); *Government of Guam v. United States*, 744 F.2d

699, 701 (9th Cir. 1984) (publication in the *Federal Register* "constituted formal notice to the world").

Further, *Heirs of Alexander Williams*, 121 IBLA at 231-33, is easily distinguishable from this case. As has been discussed, the Administrative Record in this case contains clear evidence that BLM's termination letter was received by Etta Mae Lord. This Court made clear in its previous Order that Lord's wife was an authorized agent upon whom delivery of BLM's termination letter could lawfully be made. *See* Docket No. 179 at 17, 20. The Court therefore concludes that BLM's decision of May 31, 1963, was entitled to administrative finality.

3. Were Lord's pre-deprivation due process rights violated?

In its Order, the Court noted that the Secretary of the Interior on December 6, 1958, published regulations applicable to Lord's application. 23 *Federal Register* at 9484-85, *codified at*, 43 C.F.R. §§ 67.1 to 67.11 (1963). Those regulations provided in part:

> An allotment will not be made until the applicant has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years and the lands are surveyed by the Bureau of Land Management . . .

43 C.F.R. § 67.7 (1963). This proof could be submitted either with the application, if the applicant had by that time already completed the required five years of use and occupancy, or after the filing of the application once the required use and occupancy had been completed. *Id.* The regulations also provided that if an applicant did not file

the requisite proof of use and occupancy within six years of the filing of an allotment application, that application was terminated. 43 C.F.R. § 67.5(f). Further, the regulations provided for the situation, such as in this case, where the application was filed prior to publication of the regulations:

> If the application was filed prior to the effective date of this paragraph, the application will be terminated under this paragraph only by decision of the authorized officer after appropriate notice to the applicant, granting him a reasonable time within which to file proof of continuous use and occupancy of the land as required by the regulation in this part.

Id. Since Lord's application was filed on May 24, 1957, the Court concluded that the six year period for filing of proof of use and occupancy expired on May 24, 1963.

Lord argues that the fundamental error that led to this case is BLM's treatment of Lord's allotment application as a "statutory life" application. According to Lord, BLM's May 31, 1963, decision is thrice erroneous: "(1) it was not rendered by an authorized officer, (2) it was not rendered after appropriate notice to Lord; and (3) it was rendered without giving Lord a reasonable time in which to file proof of continuous use and occupancy." *Cf. Heirs of Edward Peter*, 122 IBLA 109, 113-16 (1992). Lord characterizes this case as a predeprivation notice and hearing case. Relying upon *Pence v. Kleppe*, 529 F.2d 135, 141 (9th Cir. 1976), Lord argues that he was entitled to pre-deprivation notice and a hearing prior to his allotment application's termination.

The Court has previously noted that due process normally requires notice and an opportunity to be heard. Where any proceeding will finally determine a person's property rights, he is entitled to notice reasonably calculated, under all of the circumstances, to apprise him of the pendency of the proceeding and an opportunity to present his claim or objections. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 484 (1988). What is "reasonable notice" depends upon all of the circumstances and requires a delicate balancing of the people's interest in a final resolution of disputes and the claimant's right to protect his property.*Id.; see also Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). Actual notice by mail is sufficient to meet the requirements of due process:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Mennonite Board of Missions, 462 U.S. at 800 (emphasis in original).

In this case, there is no record indicating that Lord ever notified BLM that he had a new and different address prior to May 31, 1963. The procedure employed by the Department of the Interior with respect to BLM's May 31, 1963, decision: (1) set forth the basis of BLM's decision to terminate Lord's allotment application; (2) provided for an administrative appeal following which the termination of Lord's allotment application would

become final; (3) provided an opportunity for hearing on any issue of fact pertaining to the termination of Lord's allotment application; and (4) sent notice to Lord at his last known address in a manner in which the decision was to be delivered only to Lord or an authorized agent for Lord. This procedure was reasonably calculated to provide Lord with notice of BLM's action. The procedure also provided Lord with an opportunity to be heard. Therefore, the Court concludes that Lord's pre-deprivation due process rights were not violated.

IT IS THEREFORE ORDERED:

Plaintiff's motion for reconsideration at **Docket No. 181** is **DENIED.** Plaintiff's motion for a new trial at **Docket No. 181** is **MOOT and therefore DENIED.**

Dated at Anchorage, Alaska, this 20 day of January, 1998.

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, SR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WALTER LORD, Plaintiff, v. BRUCE BABBIT, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, AND THE UNITED STATES OF AMERICA, Defendants.	)	Case No. F94-0011 CV (JKS)

Appearances: Robert A. Sparks, Law Office of Robert A. Sparks and Robert John, Law Offices of Robert John, Fairbanks, Alaska, for plaintiff; Dean K. Dunsmore, Department of Justice, Environment & Natural Resources Division, Anchorage, Alaska, for defendants.

ORDER

DENYING DEFENDANTS' MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Walter Lord ("Lord") brings this action seeking to establish his right to a Native Allotment in the vicinity of Fairbanks, Alaska. The defendants (collectively called "the government") argue that the land in question has been patented to the State of Alaska, a necessary party, over whom this Court lacks jurisdiction and, alternatively, that the running of the applicable statute of

limitations deprives this Court of jurisdiction. The government moves to dismiss, and Lord moves for summary judgment. The Court concludes that it has jurisdiction over this case but that unresolved questions about the notice Lord received (or did not receive) of the adverse agency action regarding rejection of his allotment application prevents this Court from resolving the statute of limitations issue. Therefore, the motion to dismiss and the motion for summary judgment are denied.[1] The Court's reasons for this decision follow:

BACKGROUND

On May 24, 1957, Lord, an Alaska Native, filed an Alaska Native Allotment application for a parcel of land on the Tanana River in Fairbanks, Alaska, pursuant to the Alaska Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed 1971). Docket No. 48 (Lord's second amended complaint). Lord began using the land immediately after filing his application in 1957. Docket No. 66, Appendix 1 (Walter Lord affidavit). The Department of the Interior, Bureau of Land Management ("BLM") sent Lord a notice to his last known address,

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[1] On August 9, 1996, the Court issued a tentative decision (Docket No. 73) regarding the government's motion to dismiss (Docket No. 56) and Lord's motion for summary judgment (Docket No. 66). In that order, the Court tentatively concluded that both motions should be denied, gave its underlying reasons for that conclusion, and directed both sides to respond to the tentative order. After considering the responses from both sides (Docket Nos. 74 & 75), the Court still concludes that the government's motion to dismiss and Lord's motion for summary judgment should be denied. Docket Nos. 56 and 66.

General Delivery, Fairbanks, Alaska, on January 4, 1963 informing Lord that he needed to send to the BLM proof of his use and occupancy of the land by May 24, 1963 to prevent his allotment application from expiring. Docket No. 56, Exh. 1, Attachment B. Lord did not respond. He claims that he did not personally receive notice because the notice was sent to General Delivery, Fairbanks, Alaska instead of to the mailbox in Fairbanks at 2 mile Peger Road. Docket No. 66, Appendix 1 (Walter Lord affidavit). Defendants, however, point out that "General Delivery, Fairbanks, Alaska" was the address used by the BLM because Lord put that address on his application. *See* Docket No. 56, Exh. 1, Attachment A (allotment application).

On May 31, 1963, the BLM sent a notice to Lord's last known address, General Delivery, Fairbanks, Alaska, stating that his allotment application had been terminated due to his failure to submit proof of use and occupancy by May 24, 1963 which would have been within six years of the filing of his application. Docket No. 56, Exh. 1, Attachment C. The notice was sent certified mail, and the BLM received a return receipt indicating its delivery. *Id.*, Attachment D. The signature on the return receipt was "Etta Mae Lord." *Id.* Lord claims that he did not personally receive the notice but that his wife, Etta Mae Lord, had received it. Docket No. 66, Appendix 1 (Walter Lord affidavit). He further claims that he was not aware that his wife had received the notice "until as long as many years after it was signed for." *Id.* Lord never appealed the 1963 BLM decision.

In June of 1972, the State of Alaska amended its selection of land to specifically select the land at issue in

this case. Docket No. 56, Exh. 1, Attachment F. Tentative approval was given regarding the State's selection on February 19, 1976. *Id.*, Attachment G. Subsequently, the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1980) was enacted. Pursuant to this statute, "all right, title and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of the tentative approval. . . . " 43 U.S.C. § 1635(c). On November 12, 1985, the parcel of land at issue was patented to the State of Alaska under patent No. 50-86-0043. Docket No. 56, Exhibit 4 at ¶ 12 and Attachment H.

Lord claims that it was only after his attorney received letters from the BLM in 1994 that he realized that his application would not be reinstated. Docket No. 66, Appendix 1 (Walter Lord affidavit). Furthermore, Lord claims that it was not until he received the answer to his complaint in the instant case that he realized the United States had conveyed the land to the State of Alaska. *Id.*

Lord filed his initial complaint on May 24, 1994. He asserts that the Court has jurisdiction pursuant to 25 U.S.C. § 345, 28 U.S.C. § 1331, 43 U.S.C. § 1353 and 43 U.S.C. § 1634(a)(1).

The government has filed a motion to dismiss. Docket No. 56. Lord opposes this motion and also moves for summary judgment. Docket No. 66. The government replies at Docket No. 70. In response to this Court's tentative order (Docket No. 73), the parties have filed additional briefings (Docket Nos. 74 & 75).

DISCUSSION

Jurisdiction:

A party bringing an action in federal court bears the burden of establishing the court's jurisdiction. The United States and its agencies may not be sued, absent a waiver of sovereign immunity. *Federal Deposit Ins., Corp. v. Meyer*, 510 U.S. 471 (1994). Therefore, when a party seeks to sue the United States, he must establish that Congress has waived sovereign immunity and permitted the suit. In this case, Lord relies upon 25 U.S.C. § 345 both for this Court's jurisdiction and to establish a waiver of sovereign immunity. *See Pence v. Kleppe*, 529 F.2d 135, 138-39 (9th Cir.1976). The government argues that this Court lacks jurisdiction because § 345, which grants jurisdiction and waives immunity, is subject to a statute of limitations which has expired and because the land at issue is no longer subject to the government's jurisdiction because it has been patented to the State of Alaska. *See West v. Standard Oil Co.*, 278 U.S. 200, 211-12 (1929) and *Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1897); *see also Nichols v. Rysavy*, 610 F.Supp. 1245, 1252 (D.S.D.1985), *aff'd on other grounds*, 809 F.2d 1317 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987).

The government concedes that in *Donald Hotch v. United States*, No. J94-002 CV (JWS), this Court held that it had jurisdiction even though title to the land had been conveyed to the State of Alaska. The government distinguishes *Hotch* by pointing out that in *Hotch* there was a controlling stipulation in which the Department of the Interior had agreed to continue to process the allotment application. In *Aguilar v. United States*, 474 F.Supp. 840,

843 & 846 (D.Alaska 1979), the court held that if the government conveyed to the State land that should have been conveyed to an Indian allottee, the conveyance would be void and the government would be obligated to take whatever steps were necessary to recover the land. In *Aguilar*, the government had rejected the application for an allotment on the ground that the land had already been patented to the State. There was no stipulation to continue to process the allotment application in that case.

The government, however, seeks to distinguish *Aguilar* by pointing to 43 U.S.C. § 1635(c)(1) which was enacted subsequent to *Aguilar* and which purports to confirm tentative approvals of state land selections "subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act." 43 U.S.C. § 1635(c)(1). The government's reliance on 43 U.S.C. § 1635(c)(1) is misplaced. In *Aguilar*, the court held that use and occupancy by a potential allottee constituted prior existing rights entitled to protection. *Aguilar*, 474 F.Supp. at 843. Presumably, § 1635(c)(1) was enacted with that assumption in mind. This view of the statute is reinforced by § 1634(a)(1) which was enacted with the intention of protecting, among the class of "pending" allotment applications, those that had been erroneously rejected. Consequently, if Lord's application was erroneously rejected by the government, the subsequent patent to the State, even though legislatively confirmed, was subject to Lord's allotment rights, and the government may be required to help Lord vindicate those rights.

Aguilar disposes of the government's argument that conveyance to the State, even though pursuant to express statutory provision, insulates its treatment of Lord's

application from judicial review. *Aguilar*, 474 F.Supp. 840. Therefore, the most reasonable interpretation of congressional intent is that any conveyance to the State was subject to prior existing rights, including the rights of Indian allottees.

Application of Six-year Statute of Limitations pursuant to 28 U.S.C. § 2401(a):

The government contends that this Court lacks jurisdiction to review the 1963 BLM decision to terminate Lord's allotment application because the applicable statute of limitations had already run prior to commencement of this suit.[2] Docket Nos. 56 & 70. It claims that the statute of limitations is a jurisdictional bar rather than a waivable defense. It contends that because there is not a more specific statute of limitations applicable, this action is governed by the general statute of limitations found in 28 U.S.C. § 2401(a) which states "[e]xcept as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). This general statute of limitations has been applied to actions under 25 U.S.C. § 345. *See Big Spring v. United States Bureau of Indian Affairs*, 767 F.2d 614, 616 (9th Cir.1985); *Christensen v. United States*, 755 F.2d 705, 707 (9th Cir.1985), *cert. denied*, 476 U.S. 1181 (1986).

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[2] The government concedes that to the extent Lord is seeking review of the 1994 BLM decisions, Lord's action is not time barred. Docket No. 70.

Lord argues that no statute of limitations applies and cites to *Harrison v. Hickel*, 6 F.3d 1347, 1353 (9th Cir.1993). In response, the government argues that any reliance on *Harrison* is misguided because the reasoning in *Harrison* is not applicable. *Harrison* was a suit against the State by a private party. Although the statute of limitations was not at issue in that case, the *Harrison* court mentioned in dicta that the relevant statute of limitations could not be used to bar a suit by the United States to enforce an Indian's rights because of the special relationship between the government and Indians. *Id.* at 1353. *See also* Docket No. 49 (the government' objections to report and recommendation). In contrast with *Harrison*, the government points out, the instant case is a suit brought *against* the government and, therefore, in that type of situation Lord is subject to the applicable statute of limitations. *See United States v. Mottaz*, 476 U.S. 834, 851 (1986); *see also Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir.), *cert. denied*, 498 U.S. 824 (1990); *see also Big Spring v. United States Bureau of Indian Affairs*, 767 F.2d 614, 617 (9th Cir.1985).

Lord also argues that if a statute of limitations did apply to judicial review of the rejection of an allotment, it would not apply to him because Congress enacted 43 U.S.C. § 1634(a)(1) [Alaska National Interest Lands Conservation Act (ANILCA) § 905(a)] nullified the BLM's rejection of his application and congressionally approved his allotment request. He argues that "the enactment of ANILCA was a legislative waiver of any statute of limitations for actions to determine interests of Alaska Indians in Allotments, whose applications were denied without an opportunity for an oral hearing prior to December 18,

1971." Docket No. 66 at 6. This argument is foreclosed by *Silas v. Babbitt*, No. 95-36015, 1996 WL 496949 (9th Cir. September 4, 1996) which was decided after briefing was completed in this case. In Silas, the Ninth Circuit held that only those applications pending on or before December 18, 1971 were legislatively approved. If an application had been properly denied before that date, it was not "pending" and therefore did not have to be readjudicated. If Lord's application was legally terminated in 1963, which is the issue before this Court, then it was not confirmed by Congress in ANILCA.

In addition, Lord contends that the statute of limitations should not apply to this case because the rejection of his application was "in violation of the Department of Interior's own interpretation of the 'statutory life'[3] regulation and was also in violation of the Department's regulations in effect at the time of filing of Lord's application" and because his allotment application was rejected without a hearing. Docket No. 66 at 10.

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[3] Basically, Lord argues that the BLM violated its own "statutory life" regulation in the BLM "Native Allotment Handbook" ("Handbook") which stated that evidence of five years of use and occupancy had to be filed within six years of the original filing of this application. The Handbook, however, stated an exception to this rule by explaining that "applicants filing prior to 1958 had until 1964 to file proof of use and occupancy." Docket No. 66 at 10 (referring to BLM "Native Allotment Handbook" at II-17). Lord contends that his application was filed in 1957 and was rejected in 1963, and therefore, the BLM did not follow the exception in its own handbook which would have allowed him until 1964 to provide proof of use and occupancy. Thus, Lord argues that the BLM violated its own "statutory life" rule.

The six-year statute of limitations pursuant to 28 U.S.C. § 2401(a) applies to this case. *Cramer v. United States*, 261 U.S. 219 (1923) and *Harrison v. Hickel*, 6 F.3d 1347 (9th Cir.1993) are distinguishable from this case. The *Cramer* Court was not addressing 28 U.S.C. § 2401(a). Instead, *Cramer* involves a six-year limitations of 43 U.S.C. § 1166 which bars efforts by the United States to vacate or annul a patent more than six years after the original grant. The *Cramer* Court held that the limitations of § 1166 does not apply "because the relation of the Government to [Indian claimants] is such as to justify or require its *affirmative intervention*." *Cramer*, 261 U.S. at 234 (emphasis added). The *Cramer* Court was discussing cases brought by the United States and was not discussing cases brought against the United States. Although *Cramer* alludes to special treatment for Indians, it has been determined that even Indians are not exempt from statutes of limitations governing actions against the United States. *See Mottaz*, 476 U.S. at 851 (holding that the statute of limitations for the Quiet Title Act applies to Indians as well as to other litigants). *Cramer* should not be applied to this case because it was dealing with the relevant time period for the United States to vacate or annul a patent on behalf of Natives instead of the relevant time period for a Native to file suit against the United States under 25 U.S.C. § 345. *Harrison* cites to *Cramer* and merely states in dicta that § 1166 does not apply to Native allotment cases. *Harrison*, 6 F.3d at 1353. In context, the Ninth Circuit is referring to actions by the United States not actions against the United States.

In fact, the Ninth Circuit has discussed this issue in cases involving 25 U.S.C. § 345 and has held that the six-

year statute of limitations under 28 U.S.C. § 2401(a) "applies to *all* actions brought under § 345, whether the relief requested is legal or equitable." *Christensen v. United States*, 755 F.2d 705, 707 (9th Cir.1985) (emphasis in original) (plaintiffs were American Indians, suing under 25 U.S.C. § 345). Therefore, regardless of the fact that Lord is a Native American, the general six-year statute of limitations, 28 U.S.C. § 2401(a), applies to this case.

Application of Equitable Tolling or Estoppel:

Lord argues that if the statute of limitations applied to him, it was equitably tolled. The government responds that the statute of limitations is jurisdictional, precluding "equitable tolling." Docket No. 56. The government is correct that a claim brought within the federal statute of limitations, such as the limitation pursuant to 28 U.S.C. § 2401(a), was at one time considered to be a jurisdictional prerequisite. *See Sisseton- Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir.), *cert. denied*, 498 U.S. 824 (1990); *see also United States v. Mottaz*, 476 U.S. 834, 841 (1986) ("In particular, '[w]hen waiver legislation contains a statute of limitations, the limitation provision constitutes a condition on the waiver of sovereign immunity.' ") (quoting *Block v. North Dakota*, 461 U.S. 273 (1983)). However, more recently, the Supreme Court has seriously undermined this authority and has held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Several Ninth Circuit panels have interpreted the *Irwin* holding

to mean that the federal statutes of limitations are no longer jurisdictional in nature.[4] Therefore, instead of

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[4] A Ninth Circuit panel in *Fadem v. United States*, 52 F.3d 202 (9th Cir.1995) concludes that after the Supreme Court's decision in *Irwin* " 'federal statutory time limitations on suits against the government are *not* jurisdictional in nature.' " *Fadem*, 52 F.3d at 206 (citing *Washington v. Garrett*, 10 F.3d 1421, 1437 (9th Cir.1993)); *see also Capital Tracing, Inc. v. United States*, 63 F.3d 859, 861 n. 3 (9th Cir.1995) (because of the *Irwin* holding, "[w]e thus treat the district court's action as a dismissal for failure to state a claim, rather than as a dismissal for lack of subject matter jurisdiction."); *but see Nesovic v. United States*, 71 F.3d 776, 778 (9th Cir.1995) (recognizing that federal statutory time limitations are jurisdictional and will bar an action "unless [plaintiff] can find a recognized reason to avoid this result." [such as equitable tolling and estoppel]) (citing *Irwin*).

It appears that some panels of the Ninth Circuit have differing views as to how far the *Irwin* holding should be stretched. On the one hand, the *Fadem* and *Garrett* panels interpret the *Irwin* holding to mean that federal statutory time limitations are no longer jurisdictional in nature. On the other hand, the *Nesovic* panel still recognizes that the federal statutory time limitations are jurisdictional in nature but can be subject to equitable tolling and estoppel. Although the *Nesovic* decision is later in time, the other panels seem to apply the *Irwin* decision more accurately. It is immaterial that *Nesovic* addressed the same statute of limitations that is involved in this case, 28 U.S.C. § 2401(a), while *Garrett*, *Fadem*, *Supermail*, and *Capital Tracing* all refer to other statutes of limitations. Rather, it is important to note that the *Irwin* holding was not limited to a specific statute of limitation but was intended to apply generally to suits against the government. *See Irwin*, 498 U.S. at 95 ("[w]e think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.").

The Ninth Circuit panel in *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204 (9th Cir.1995) explained the procedural impact of the *Irwin* ruling by pointing out that now that the

addressing the government's motion regarding the statute of limitations issue as a 12(b)(1) motion to dismiss for lack of jurisdiction, this Court must address it as a Rule 12(b)(6) motion to dismiss for failure to state a claim.

Lord filed his complaint in this action on May 24, 1994. If his claim accrued more than six years before this suit was filed, or if the statute of limitations was not tolled, Lord's claim is barred.

Under federal law, a cause of action accrues when plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir.1990).

The Ninth Circuit has distinguished between equitable tolling and equitable estoppel by stating that "equitable tolling applies when the plaintiff is unaware of his cause of action, while equitable estoppel applies when a plaintiff who knows of his cause of action reasonably relies on the defendant's statements or conduct in failing to bring suit." *Stitt v. Williams*, 919 F.2d 516, 522 (9th Cir.1990). Because Lord has consistently argued that he did not receive any information from the government until 1994 regarding his application, it will be difficult for Lord to argue that the government somehow lulled him into not filing suit in time. Therefore, it does not appear

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rebuttable presumption of equitable tolling applied to federal statutory time limitations, the issue is no longer jurisdictional and therefore the issue should be raised through a "Rule 12(b)(6) motion to dismiss for failure to state a claim, not a Rule 12(b)(1) motion to dismiss for lack of jurisdiction." *Supermail*, 68 F.3d at 1206 n. 2.

that the doctrine of equitable estoppel applies to this case.

In addition, if Lord received adequate notice of the rejection of his claim, the doctrine of equitable tolling should not apply to the instant case either. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *see also Scholar v. Pacific Bell*, 963 F.2d 264, 267-68 (9th Cir.), *cert. denied*, 506 U.S. 868 (1992) (applying the doctrine "sparingly" and only in "extreme cases" such as when a plaintiff filed defective pleadings, was tricked by an adversary into letting the time period elapse, or when the EEO's notice was inadequate).

The question of equitable tolling, the question of when Lord's action for judicial review accrued and the question whether Lord received procedural due process all collapse into a single question: Did Lord receive adequate notice? The issue of notice blends with the due process concerns expressed in *Pence v. Kleppe*, 529 F.2d 135 (9th Cir.1976) and *Aguilar v. United States*, 474 F.Supp. 840 (D.Alaska 1979). In determining whether Lord received adequate notice of the agency decision rejecting his application, the Court must consider the nature of the notice that he was sent. Although it is not binding on this Court, the Alaska Supreme Court has stated that the proper tailoring of notice to the capacities and circumstances of indigent bush residents requires the communication of substantially more information regarding the methods for responding and defending their interests than normally would be required. *Aguchak v. Montgomery Ward Co., Inc.*, 520 P.2d 1352, 1357 (Alaska 1974); *see also*

Ogle v. Salamatof Native Association, Inc. 906 F.Supp. 1321 (D.Alaska 1995) (discussing notice under similar circumstances).

After *Irwin*, federal statutes of limitation are no longer jurisdictional. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Therefore, the government's motion to dismiss on the grounds that this action is barred by the applicable statute of limitations must be treated as a motion to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6) instead of a motion to dismiss for lack of jurisdiction under FED. R. CIV. P. 12(b)(1). *See Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n. 2 (9th Cir.1995). Furthermore, because this Court must consider material outside of the pleadings in order to determine whether Lord received sufficient notice of the rejection of his application to trigger the statute of limitations and satisfy due process or whether equitable tolling should apply, the motion under FED. R. CIV. P. 12(b)(6) must be deemed a motion under FED. R. CIV. P. 56. *Carter v. Stanton*, 405 U.S. 669 (1972); *see also* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366 (1990). The existing record will not permit resolution of the notice issues.

State of Alaska as an Indispensable Party:

The government contends that this action should nevertheless be dismissed because the State of Alaska is an indispensable party. In determining whether a non-party is indispensable, the Court must first decide whether the absent party is "necessary" to the action and

then must decide whether the absent party is " 'indispensable' so that in 'equity and good conscience' the action should be dismissed." *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir.1991) (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990)). When addressing whether an absent party is necessary, two inquiries must be made: (1) whether complete relief is possible between the parties already in the action; and (2) whether the absent party has a legally protected interest in the outcome of the action. *See* FED. R. CIV. P. 19(a). Although this two-step process is the general test, there is no precise formula in determining whether a party is necessary and "[t]he determination is heavily influenced by the facts and circumstances of each case." *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir.1982).

The State is not a necessary party to this action. Lord is seeking an order that the government has an obligation to adjudicate his application and, depending on the adjudication, to seek reconveyance[5] from the State. *See* Docket No. 48 (Lord's second amended complaint); *see also Harrison v. Hickel*, 6 F.3d 1347, 1353 (9th Cir.1993); *see also Aguilar v. United States*, 474 F.Supp. 840, 847 (D.Alaska 1979) ("[i]f the defendant [the United States] has mistakenly or wrongfully conveyed land to the State of Alaska to which plaintiffs have a superior claim, it is the responsibility of the defendant to recover that land."); *see also United States v. Cramer*, 261 U.S. 219 (1923). The issues between Lord and the government do not require the

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[5] The United States can sue the State without regard to the Eleventh Amendment. *See United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

State's presence for their adjudication. The State will not be prejudiced by a ruling in this case. The government argues that if the State is not made a party inconsistent results are possible, i.e., that the government might be unsuccessful in recovering the land from the State in a separate action after having been found liable to Lord. If the government fears inconsistent remedies, it has a ready protection in Fed.R.Civ.Proc. 14 since it could bring the State in as a third-party defendant. Dismissal of this action is not warranted.

IT IS THEREFORE ORDERED:

This Court has jurisdiction over this action pursuant to 25 U.S.C. § 345 and 28 U.S.C. § 1353. In addition, the six-year statute of limitations pursuant to 28 U.S.C. § 2401(a) applies to this case. The State of Alaska is not an indispensable party.

On the present record, this Court is not prepared to convert a FED. R. CIV. P. 12 motion into a FED. R. CIV. P. 56 motion because the parties have not squarely addressed the equitable tolling issue. Equitable tolling of the statute of limitations is a viable issue which cannot be resolved on a motion to dismiss. There still remain disputed facts regarding whether Lord received adequate notice from the government which would have triggered the applicable six-year statute of limitations and would have satisfied Lord's due process rights. The adequacy of the notice is the linchpin of whether this action is barred altogether. The government's motion to dismiss at **Docket No. 56** and Lord's motion for summary judgment at **Docket No. 66** are both **DENIED**.

DATED at Anchorage, Alaska this 30 day of September, 1996.

/s/ James K. Singleton, Jr.
HONORABLE JAMES K. SINGLETON, JR.
United States District Court Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER LORD, Plaintiff-Appellant, v. BRUCE BABBITT; UNITED STATES OF AMERICA, Defendants-Appellees.	No. 98-35166 D.C. No. CV-94-00011-JKS ORDER (Filed Jan. 10, 2000)

Before: HUG, Chief Judge, TROTT, and TASHIMA, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing, has voted to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

THE UNITED STATES CONSTITUTION

Amendment V provides:

Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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5 U.S.C. § 702 Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any

mandatory or injunctive decree shall specify the Federal officer or officers (by name or title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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25 U.S.C. § 345. Actions for allotments

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same

effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

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28 U.S.C. § 1254 Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

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28 U.S.C. § 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

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28 U.S.C. § 1346 United States as defendant

* * *

(1) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

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28 U.S.C. § 1353. Indian allotments

The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.

The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands held on or before December 21, 1911, by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency.

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28 U.S.C. § 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United

States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

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28 U.S.C. § 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

* * *

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

* * *

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43 U.S.C. §§ 270-1 to 270-3 The Alaska Native Allotment Act

Sec. 1. The Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in the district of Alaska or subject to the provisions of the Act of March 8, 1922 (42 Stat. 415, 48 U.S.C. §§ 376 to 377), vacant, unappropriated and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits, to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or who is 21 years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress provided that any Indian, Aleut or Eskimo who receives an allotment under this Act, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted, and such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding 160 acres.

Sec. 2. Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

Sec. 3. No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

[Repealed but with a savings clause for applications pending on December 18, 1971 by PL 92-203, 85 Stat. 688, 43 U.S.C. § 1617 (1971).]

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43 U.S.C. § 1634. Alaska Native allotments

(a) Approval of applications for certain lands; lands containing coal, oil, or gas; nonmineral lands; lands within National Park System; protests; voluntary relinquishment of application

(1) Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve – Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following December 2,

1980, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final. The Secretary shall cause allotments approved pursuant to this section to be surveyed and shall issue trust certificates therefor.

(2) All applications approved pursuant to this section shall be subject to the provisions of the Act of March 8, 1922 (43 U.S.C. 270-11) [43 U.S.C. §§ 270-11 to 270-13].

(3) When on or before the one hundred and eightieth day following December 2, 1980, the Secretary determines by notice or decision that the land described in an allotment application may be valuable for minerals, excluding oil, gas, or coal, the allotment application shall be adjudicated pursuant to the provision of the Act of May 17, 1906, as amended, requiring that land allotted under said Act be nonmineral: *Provided*, That "nonmineral", as that term is used in such Act, is defined to include land valuable for deposits of sand or gravel.

(4) Where an allotment application described land within the boundaries of a unit of the National Park System established on or before December 2, 1980, and the described land was not withdrawn pursuant to section 11(a)(1) of the Alaska Native Claims Settlement Act [43 U.S.C. § 1610(a)(1)], or where an allotment application describes land which has been patented or deeded to the State of Alaska or which on or before December 18, 1971, was validly selected by or tentatively approved or confirmed to the State of Alaska pursuant to section

11(a)(1)(A) of the Alaska Native Claims Settlement Act [43 U.S.C. § 1610(a)(1)(A)] from those lands made available for selection by section 11(a)(2) of the Act [43 U.S.C. § 1610(a)(2)] by any Native Village certified as eligible pursuant to section 11(b) of such Act [43 U.S.C. § 1610(b)], paragraph (1) of this subsection and subsection (d) of this section shall not apply and the application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, the Alaska Native Claims Settlement Act [43 U.S.C. § 1601 et seq.], and other applicable law.

(5) Paragraph (1) of this subsection and subsection (d) of this section shall not apply and the Native allotment application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, if on or before the one hundred and eightieth day following December 2, 1980 –

> **(A)** A Native Corporation files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application, and said land is withdrawn for selection by the Corporation pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. § 1601 et seq.]; or
>
> **(B)** The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states

with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist; or

(C) A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.

(6) Paragraph (1) of this subsection and subsection (d) of this section shall not apply to any application pending before the Department of the Interior on or before December 18, 1971, which was knowingly and voluntarily relinquished by the applicant thereafter.

* * *

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43 C.F.R. (1963)

§ 67.5 Applications for allotment.

* * *

(f) The filing of an application for allotment will grant no rights to the applicant over and above those which are specified in §§ 67.6 and 67.11. If the applicant does not submit the proof required by § 67.7 within 6 years of the filing of his application in the land office, his application for allotment will terminate without affecting the rights of the application gained by virtue of his occupancy of the land, or his rights to make another application. If the application was filed prior to the effective date of this paragraph, the application will be terminated under this paragraph only by decision of the authorized

officer after appropriate notice to the applicant, granting him a reasonable period within which to file proof of continuous use and occupancy of the land as required by the regulation in this part.

§ 67.6 Segregative effect of applications.

The filing of an acceptable application for allotment will segregate the lands to the extent that conflicting applications for such lands will be rejected, except when accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land.

§ 67.7 Allotments.

An allotment will not be made until the applicant has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years and the lands are surveyed by the Bureau of Land Management. Such proof must be made in triplicate and filed in the appropriate land office. It must be signed by the applicant, but if he is unable to write his name, his mark or thumb print must be impressed on the statement and witnessed by two persons. the showing of five years' use and occupancy may be submitted with the application for allotment if the applicant has then used and occupied the land for five years, or at any time after the filing of the application when the required showing can be made. The proof should give the name of the applicant, identify the application on which it is based, and appropriately describe the land involved. It should show the periods each year applicant has resided on the land; the amount of the land cultivated each year to garden or other crops;

the amount of crops harvested each year; the number and kinds of domestic animals kept on the land by the applicant and the years they were kept there; the character and value of the improvements made by the applicant and when they were made; and the use, if any, to which the land has been put for fishing or trapping.

SEGREGATION OF OCCUPIED LANDS

§ 67.11. Occupied lands not subject to entry.

Lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others. [Circ. 2008, F.R. 9485, Dec. 6, 1958]

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014623

APPLICATION FOR ALLOTMENT OF LANDS IN ALASKA BY NATIVE INDIANS OR ESKIMOS.

(Act May 17, 1906, 34 Stat., 197.)

Land Office at Fairbanks

Application No. ___ May 24, 1957

I, Walter Lord, of Gen. Delivery Fairbanks Alaska (Give post-office address.) do hereby apply to have allotted to me under the act of May 17, 1906 (34 Stat., 197), the[1] Lot 4 and The N E ¼ N E ¼ Section 30, T 1 South, Range 1 West Fairbanks Meridian

containing 90.97 acres and I do solemnly swear that I am a mixed blood (Insert "full blood" or "mixed blood.") ~~Indian~~ or Eskimo, born and now residing in the District of Alaska, and that I am the head of a family, (Insert "the head of a family" or "a single person over 21 years of age.") ~~and that I have occupied the land so applied for since~~ May 24, 1957, (Insert date, if occupied, or strike out

[1] Insert the description, by legal subdivisions if surveyed; if unsurveyed, by meter and bounds, beginning with some permanent natural object that can be readily identified or some permanent monument set for the purpose.

the clause, if not occupied.) and that I have not heretofore made application under this act; that the land described herein is not reserved by authority of any act of Congress or embraced in any reservation made by Executive Order or Proclamation of the President.

(Signed) Walter Lord

CORROBORATIVE STATEMENT

We, Mrs Meda Lord, and Edith Smith, do solemnly state that we are well acquainted with Walter Lord and know that he is a native-born Indian or Eskimo of full or mixed blood, now residing in the Territory of Alaska, and is The head of a Family, (Insert "the head of a family" or "a single person over 21 years of age.") ~~and has occupied the land described in the foregoing application since~~ _____ (Insert date, if occupied, or strike out the clause, if not occupied.)

/s/ Mrs. Meda Lord

/s/ Edith Smith

NONMINERAL STATEMENT

I, Walter Lord, do solemnly state that I am well acquainted with the character of land described in this application and with each and every legal subdivision thereof, having frequently passed over the same; that my present knowledge of such lands is sufficient to enable me to testify intelligently with regard thereto; that there is not to my knowledge within the limits thereof any vein

or lode of quartz or other rock bearing gold, silver, zinc, tin, copper, or other deposit, and there is not within the limits of said land to my knowledge any cement or any valuable mineral deposits; that the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no part of said land is claimed for mining purposes under the customs and rules of miners or otherwise; that no part of the land is worked for minerals during any part of the year by any person, or persons.

/s/ Walter Lord

_____

United States Land Office,

_____

_____, 19__

I, _____, Manager of the Land Office, do hereby certify that the above application is for _____ (Insert "surveyed" or "unsurveyed.") lands of the class which the applicant is legally entitled to select under the act of May 17, 1906 (34 Stat., 197), and that there is no prior valid adverse right to the same.

_____

Manager

Robert A. Sparks
Law Office of William R. Satterberg
709 Fourth Avenue
Fairbanks, Alaska 99701
Phone: (907) 452-4454

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF ALASKA

WALTER LORD Plaintiff, VS. BRUCE BABBIT, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, Defendant.	Case No. F94-011 Civil (JKS)

AFFIDAVIT OF WALTER LORD

I, WALTER LORD, being duly sworn upon oath depose and state as follows:

1. That, I am the Plaintiff in the above-entitled case, and I am an Alaska Eskimo Indian.

2. That, I have personal knowledge of the facts contained within this Affidavit and am competent to testify thereto.

3. That, I filed the Application for an Alaska Native Allotment, a true and correct copy of which is attached

hereto as Exhibit "A" on May 24, 1957, with the Department of Interior, Bureau of Land Management in Fairbanks, Alaska.

4. I began to immediately use the land described in my allotment application. I began subsistence fishing on the property described in the application. I also built a fish camp and a fish wheel there that summer. I continued using the land for a fish camp for subsistence fishing for King and Chum Salmon in the Tanana River, to repair, maintain and store my fish wheel, for berry picking during the fall, and for cutting and gathering wood for firewood for use in my household. I used the property for trapping every year and for hunting small game to feed my family. I did not allow other people to use my allotment for any purposes without my consent.

5. I continued using the property for these uses until September or October of 1973.

6. From 1958 till 1973, I maintained a mail box in Fairbanks, Alaska at 2 mile Peger Road where I received my mail. I did not receive any correspondence by mail from the Department of the Interior regarding my Application for an Alaska Native Allotment during 1962 and 1963. The letter attached to the Affidavit of James F. Moore, as Attachment "C", was apparently received by my wife Etta Mae Lord. I was not aware that my wife had received this correspondence until as long as many years after it was signed for by my wife, and I was not aware that any decision had been made concerning my Native Allotment that I needed to or had the right to appeal.

7. I have always wanted to receive my Allotment and I was not aware that it had been conveyed to the

State of Alaska by the United States. I have always been confused as to why my allotment application was not reinstated and the Bureau of Land Management never told me that they would not issue my allotment or that it would not be reopened, until 1994, when my attorney received the letters attached hereto as Exhibit "B" and "C" from the BLM. In addition, the first time that I learned that the United States had conveyed land within my Native Allotment to the State of Alaska was when the Defendant responded to my Complaint filed in the above-captioned action.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 23rd day of September, 1994, at Fairbanks, Alaska.

/s/ Walter Lord
Walter Lord

SUBSCRIBED AND SWORN to or affirmed before me this 23rd day of September, 1994.

(SEAL)

/s/ Delores Delacruz
Notary Public in and for Alaska
My commission expires: 10-16-96

Robert A. Sparks
Law Office of Robert A. Sparks
11552 Noble Street
Fairbanks, Alaska 99701
Phone: (907) 451-0875

Robert John
709 Fourth Avenue
Fairbanks, AK 99701
Phone: (907) 452-4454

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WALTER LORD	)	
Plaintiff,	)	
vs.	)	Case No. F94-0011 CV (JKS)
BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.	)	
Defendants.	)	

SECOND AFFIDAVIT OF WALTER LORD

STATE OF ALASKA	)	
	)	ss.
FOURTH JUDICIAL DISTRICT	)	

I, Walter Lord, being duly sworn upon oath depose and state as follows:

1. I did not receive the BLM Notice entitled "Submission of Evidence of Use and Occupancy Required",

stamp dated January 4, 1963, attached hereto as Appendix A. I also did not receive the BLM decision entitled "Statutory Life of Native Allotment Application Terminated, Case Closed", stamp dated May 31, 1963, attached hereto as Appendix B. At the time BLM alleged that these notices were sent I received my mail at 2 Mile ~~Cartwright~~ Peger W.L. Road, Fairbanks, Alaska.

2. My wife, Etta Mae Lord, has reviewed the green card and BLM decision, stamp dated May 31, 1963, attached hereto as Appendix C, and she has stated to me that she does not recall receiving any correspondence from BLM regarding my Native Allotment Application.

3. I did not receive the letter from O.L. Williamson, attached to this affidavit as Appendix D. This letter was addressed to me at general delivery, Fairbanks, Alaska, and at the time of the letter I received my mail at 2 Mile ~~Cartwright~~ Peger W.L. Road.

4. Attached as Appendix E to this affidavit is a true and accurate copy of photographs of furs which I trapped on the land described in my native allotment.

FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED this 3 day of June, 1997 at Fairbanks, Alaska.

/s/ Walter Lord
Walter Lord

SUBSCRIBED AND SWORN to or affirmed before me this 3rd day of June, 1997.

/s/ Carolyn Sparks
Notary for Alaska
My commission
expires: 1-25-2000

Robert A. Sparks
Law Office of Robert A. Sparks
1552 Noble Street
Fairbanks, Alaska 99701
Phone: (907) 451-0875

Robert John
709 Fourth Avenue
Fairbanks, AK 99701
Phone: (907) 452-4454

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WALTER LORD	)	
	)	
Plaintiff,	)	Case No. F94-0011
vs.	)	CV (JKS)
	)	
BRUCE BABBITT, SECRETARY	)	
OF THE INTERIOR, et al.	)	
	)	
Defendants.	)	
	)	

THIRD AFFIDAVIT OF WALTER LORD

STATE OF ALASKA	)	
	)	ss.
FOURTH JUDICIAL DISTRICT	)	

I, Walter Lord, being duly sworn upon oath depose and state as follows:

1. I did not receive the BLM Notice entitled "Submission of Evidence of Use and Occupancy Required", stamp dated January 4, 1963, attached hereto as Appendix A. I also did not receive the BLM decision entitled

"Statutory Life of Native Allotment Application Terminated, Case Closed", stamp dated May 31, 1963. attached hereto as Appendix B. At the time BLM alleged that these notices were sent I received my mail at 2 Mile Peger Road, Fairbanks, Alaska. I put my mailbox up at 2 Mile Peger Road in 1958.

2. My wife, Etta Mae Lord, has reviewed the green card and BLM decision, stamp dated May 31, 1963, attached hereto as Appendix C, and she has stated to me that she does not recall receiving any correspondence from BLM regarding my Native Allotment Application.

3. I did not receive the letter from O.L. Williamson, attached to this affidavit as Appendix D. This letter was addressed to me at general delivery, Fairbanks, Alaska, and at the time of the letter I received my mail at 2 Mile Peger Road.

4. Attached as Appendix E to this affidavit is a true and accurate copy of photographs of furs which I trapped on the land described in my native allotment application. I had used the land since 1955 for King and Chum salmon fishing. I built a fish drying rack on the land and used the land for processing and drying fish. I had a fish camp there in 1955 - 72. I started raising dogs during 1957 and had a dog kennel for pups down on my land described in my Native allotment application during the summers from 1957 - 1968. I continued to use my allotment for fishing and fish processing through 1968. I used my allotment for fur trapping every year from 1957 thorough about 1973 or 1974. I continue to hunt small game, muskrat, ptarmigan, grouse, ducks and rabbit, and I still do

some beaver, fox and muskrat trapping on my allotment land.

5. The only out of town job that I took during 1957 - 1963, was during 1961, I worked at St. Lawrence Island from July through September. I started fishing that summer on my allotment and had most of my fish on the rack, prior to going out of town to work. My brother Roland watched my dogs and took care of my fish for me while I was out of town working that summer. I returned at the beginning of October. I trapped on my allotment that winter. I cut and hauled wood from my allotment land for heating every year from 1958 though 1973.

6. When I filed my application, the Clerk at the BLM office told me that since I did not have five years use and occupancy that I should draw a line through the language in the paragraph on the application form that asked what date my use and occupancy began. I drew a line through that language on the allotment application, as I was told by the BLM clerk. I was told by the Clerk to put down the date I was filing as the date I started to use the land. I did not state in the application that the date I filed the application was the first time I used my allotment land.

7. When I filed my application, I understood that BIA would file proof of five years use on my behalf to obtain a patent. I was told that my application was filed on land that had already been surveyed since 1913. I was not aware of the requirement that I needed to file evidence of my use of the land described in my allotment application within six years. I was told at the BLM office

when I filed my allotment application to just tell BIA when you get 5 years use of the land.

After I filed my allotment application, I contacted the BIA office here in Fairbanks and tried to find out what I needed to do to get my patent. I believe that I did this during 1961 or 1962. I do not recall who I talked to at BIA's office here in Fairbanks. I was told by BIA that the property would have to be surveyed before I could file proof of my use and occupancy. I was told that after they did the survey, that they would contact me about my allotment application. I was never told that there was a six year time limit to file my proof of use and occupancy.

8. I tried to find out what was going on with my allotment application during the next few years. I was always told by BIA employees that they could not do anything with my application, because the land had not been surveyed yet. I told them that I had filed on surveyed land, they told me that they would check into it and "we'll get back to you."

9. I contacted BLM about filing another allotment in the 1960s. There was another 46 acres or so that I understood was open on the other side of my neighbors Bob and Grace. Grace's maiden name was Pikok. When I talked to BLM or BIA, I think it was BLM (because they had the maps) they told me that if I filed an application for more land, it would have to be adjacent to mine. I did not want to file against Bob and Grace's land, so I did not file another application then. During the late 1960s or early 1970s, I contacted BLM about filing another allotment application on land on the Yukon River where my family had lived for years. I was told that I could not file

another application, because I had filed an application for my land in section 30 near Fairbanks. I think that I contacted BIA about this also. It is my recollection that BLM officials told me that I could not file an another allotment application for land on the Yukon River, or anywhere else, because my applications had to be for land that adjoined the land I had already filed on or be in close proximity to it.

10. During the late 1960s or early 1970s, Bo Hinckle was one of the BLM employees who I spoke with regarding the land that had been selected by the Village of Beaver (I also have a cabin in Beaver that I had been unable to obtain title to the land). Bo Hinckle told me that my land in Section 30 near Fairbanks was tentatively planned to be given to the state. I sent a letter to BIA and told them that I was concerned about my allotment application, because of the information that I had received that the land in my application was tentatively planned to be given to the State of Alaska. I was told by BIA that I had nothing to worry about. BIA told me that there were many applications that had been filed many years before mine and that these applicants were still getting their land and that was no time limit to issue my Native Allotment patent.

11. I eventually decided BIA and Tanana Chiefs, were not going to help me with my allotment application claim. I was told that the BLM, BIA and the State of Alaska attorneys were the same people and that they might have a conflict of interest and that I should take my file to Alaska Legal Services. I went to see George Tobuk in 1984 at Tanana Chief's Conference Realty Department about, taking my file to Alaska Legal Services. George

Tobuk said that he would take or mail my file to Alaska Legal Services. I cannot recall what I else I discussed with George Tobuk. When I talked to Alaska Legal Services, they said they would request my file from Tanana Chiefs Conference.

12. I received statements from the Fairbanks North Star Borough about something that was called a "free use tax" that referred to "unpatented homestead" land. I understood these statements to relate to my Allotment Application, because they referred to my legal description, Lot 4, section 30, NE1/4, NE1/4 T1S, R1W Fair. Meridian. I knew that I did not have to pay taxes on my allotment, so I threw the statements away. I cannot recall how long I received these statements. These statements were sent to me at my address on 2 mile Peger Road. I believe I may have received a statement after we moved to our new home on Park Drive in the fall of 1973.

13. I did not know about any six year limitation to file evidence of my five years proof of use of the land in my Allotment Application, until my attorney told me about the six year time limit to file a on June 4, 1997.

14. I was always told that my land would have to be surveyed before anything could be done with my application. I was told by BIA and Tanana Chiefs that they were too busy, had too many applications, had too much work to do, during the 1970s and early 1980s. It was never my understanding that I was supposed to take any further action on my allotment application. It was always my understanding that BIA was responsible for filing my proof of use and occupancy for me to get my patent.

15. I am aware of many persons who submitted applications for Alaska Native Allotments where the land was subsequently conveyed to the State of Alaska the Allotment Applications were subsequently approved and the Department of the Interior agreed to get the land back from the State of Alaska. Attached as Exhibit "A" is a copy of a decision granting my Aunt Edith Smith's allotment application, after the land had been conveyed to the State of Alaska.

FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED this 7, day of August, 1997 at Fairbanks, Alaska.

/s/ Walter Lord
Walter Lord

SUBSCRIBED AND SWORN to or affirmed before me this 7th day of August, 1997.

/s/ Robert A. Sparks
Notary for Alaska
My commission expires:
1/25/2000

* * *

6. *Has Evidence of Occupancy Been Filed?* If the application was not legislatively approved and requires adjudication under the 1906 criteria, evidence of 5 years use and occupancy must have been filed within 6 years of the filing of the original application. An exception to this rule is found in applications filed before 1958. Use and occupancy became a statutory requirement under the 1956 amendment (see Appendix 1). On December 6, 1958, the Secretary published regulations implementing this statute, 23 F.R. 9484, 43 CFR 67.5(f) (1959). Therefore, applicants filing prior to 1958 had until 1964 to file proof of use and occupancy. (Evidence of 5 years' use and occupancy was first required by regulation on June 22, 1935, under Circular 1359.)

This 6-year period is referred to as the "statutory life" of the claim, although the requirement is actually regulatory rather than statutory. Failure to file within the 6 years is grounds for rejection of the claim (although if the lands were still open, the applicant could have filed a new application and applied the previous occupancy period to the new application). Claims rejected for failure to file evidence of occupancy have been commonly called "stat. life" cases and are legally closed if a decision rejecting the claim was issued prior to December 18, 1971 and was not appealed. Applications which were rejected on factual issues before the statutory life of the claim had expired, should be reinstated to give the applicant a hearing on those factual issues.

If the application and evidence of occupancy were filed at the same time, but use and occupancy began less than 5 years before the filing, the applicant (or BIA on behalf of heirs) will have had to submit a new

evidence of occupancy to show 5 years' use completed within 6 years of the filing the application. (Again, note exception for applications filed before 1964, *supra*.) If the claim was legislatively approved, no evidence of occupancy is required.

7. Reinstated Applications.

a. *Criteria for Reopening Cases*. In deciding whether a case should be reinstated, the following criteria needs to be considered:

(1) The following types of case files will not be reopened:

(a) Properly closed files:

i. status shows that the land was unavailable at the time claimed use began;

ii. properly relinquished;

iii. statutory life expired/mineral waiver not signed;

iv. land certificated for acreage applied for even if less than 160 acres.

(b) Any file that we would simply be rejecting for another reason (i.e., legal defect).

(c) A file that was closed erroneously if the applicant filed again under a different serial number and the subsequent file was closed properly. A case *could* be reinstated, however, if the applicant first applied for say only 40 acres and then applied again (on or before December 18, 1971) for 40 to 120 acres.

(2) Do *not* review or reopen, *at our own initiative*, any file closed prior to December 18, 1971. Review and possibly reinstate, if the applicant, a legal representative or BIA, requests reinstatement and presents clear and compelling evidence that the file was erroneously closed. Clear and compelling means:

(a) specific reasons for reopening (why the closure was erroneous); and

(b) supporting documentation, i.e. affidavits from the applicant, heirs, and/or individuals knowledgeable of applicant's use of the land and, in situations involving relinquishments, intent of the applicant.

If the requests are to be rejected, administrative finality could be used as one reason (see Solicitor's opinion of July 11, 1988).

If a case file has been reinstated but does not meet the criteria noted above, request the required information. If the information is not received, close the file by notice stating that the application was reinstated in error.

(3) Review, at our own initiative, all files closed after December 18, 1971, to ensure proper closure and reinstate those which were erroneously closed.

Whenever a case is being reinstated, complete part I of Mini Review form dated December 17, 1979 (Illustration 2), and route the case to the Title and Land Status Section (T&LS) for replotting to the status plat. Update the AALMRS abstract (status, history, and land description) to show the application (or parcel) has been reinstated. There are two common situations requiring reinstatement of previously closed cases:

b. *Pence Cases.* The first are those commonly called the Pence cases. *Sarah Pence, et al. v. Thomas Kleppe, et al.* (Pence I), 529 F.2d 135 (9th Circuit, 1976) resulted from situations where BLM initially rejected allotment applications without hearings for lack of evidence of use and occupancy, independent use as a minor child, status as head of household, community use, etc. On appeal, the Interior Board of Land Appeals (IBLA) affirmed as did the District Court of Alaska after Sarah Pence filed a lawsuit in 1975. The Ninth Circuit, however, ruled that applicants are entitled to an oral hearing if a proposed rejection is based on the factual issues. All cases closed in whole or in part because of factual issues have been or should now be reinstated for continued processing under the 1906 act or Sec. 905 of ANILCA. The ALSC later appealed the Departmental decision to handle oral hearings using established contest procedures. IBLA ruled that contests met the Ninth Circuit requirement; the District Court and Ninth Circuit agreed. [*Pence v. Andrus* (Pence II), 586 F. 2d 733 (9th Circuit, 1978).] Proposed adverse actions based on factual issues have since been handled through contest proceedings.

c. *Invalid Relinquishments.* Reinstatement is also required when there has been an invalid relinquishment of an application. In order for a relinquishment to be valid, the application must have been *knowingly* and *voluntarily* relinquished by the applicant. There could be many reasons why an allottee signed a relinquishment: he/she could have been promised a townsite lot rather than an allotment or maybe he thought he would lose his entire allotment if he didn't relinquish a portion. Whatever the reason, it must be decided if the

relinquishment was given intentionally, consciously, or willfully. See *Peter Andrews Sr. v. Bureau of Land Management*, 93 IBLA 355 (1986).

* * *

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Fairbanks Land Office
~~516 Second Avenue~~ P.O. Box 1150
Fairbanks, Alaska

JAN 4 1963

NOTICE

Walter Lord	:	Fairbanks 014623
General Delivery	:	Native Allotment Application
Fairbanks, Alaska	:	

Submission of Evidence of Use and Occupancy Required

The time fixed by law within which to submit proof of use and occupancy of the lands embraced in the above identified allotment application will expire on May 24, 1963.

The proof must be executed and filed in this office in triplicate on Form 4-1426. Please refer to the enclosed information pamphlet for instructions pertaining to the completion of the form.

/s/ Robert F. Hilton
Robert F. Hilton
Chief, Lands Section

Enclosures:
Form 4-1426 (3)
BIA Information Pamphlet

Information Copy To:
Area Director
Bureau of Indian Affairs
Juneau Area Office
Juneau, Alaska

cc: Case
Reading
PZH:db 12-28-62

Flo Form 207
June 1961

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Fairbanks Land Office
~~516 Second Avenue~~ P.O. Box 1150
Fairbanks, Alaska

MAY 31 1963

Certified Mail
Return Receipt Requested

DECISION

Walter Lord	:	Fairbanks 014623
General Delivery	:	Native Allotment Application
Fairbanks, Alaska	:	

Statutory Life of Native Allotment Application
Terminated, Case Closed

On May 24, 1957, the applicant filed the above identified Native Allotment Application.

The regulation contained in 43 CFR 67.5(f) provides that an applicant for allotment must submit proof of substantially continuous use and occupancy of the land within six years from the date of filing the application. The six year period expired on May 24, 1963, without the submission of the required proof.

Accordingly, the application for allotment is terminated and the case filed closed of record in this office. This

decision does not affect the rights of the applicant to make another application (43 CFR 67.5(f).

/s/ Robert F. Hilton
Robert F. Hilton
Chief, Lands Section

Information Copy To:
Area Director
Bureau of Indian Affairs
Juneau Area Office
Juneau, Alaska

cc: Case
Reading PZH:ja 5-28-63

[Certified Receipts Omitted In Printing]

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF RESEARCH & DEVELOPMENT

F014623

JAY S. HAMMOND, GOVERNOR

323 E. 4TH AVENUE
ANCHORAGE, ALASKA 99501

279-5577

May 7, 1981

Robert E. Sorensen
Chief, Branch of Lands
and Minerals Operations
Bureau of Land Management

This letter from the State of Alaska is filed pursuant to the provisions of Section 905 of the Alaska National Interest Lands Conservation Act, 94 Stat. 2371.

Attached is a list of Native Allotment applications made pursuant to the Act of May 17, 1906 which claim lands that appear to conflict with lands which have been patented to the State of Alaska. The applicant is not entitled to the land for which he or she has applied because it is owned by the State of Alaska. We request that the applications listed on the attached exhibit not be approved pursuant to Section 905 of ANILCA, and that they be adjudicated pursuant to the requirements the Act of May 17, 1906.

/s/ Reed Stoops
Reed Stoops
Director

[SEAL]

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Alaska State Office
701 C Street, Box 13
Anchorage, Alaska 99513

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

IN REPLY REFER TO

2561 (941)
A-01285, etc. 1/

M.J. Smith
1-14-82
B. Yoppke

1/15/82
JAN 18 1982

DECISION

State of Alaska	:	A-01285, etc. 1/
Department of Natural Resources	:	Native Allotments
Division of Research and Development	:	
Pouch 7-005	:	
Anchorage, Alaska 99510	:	

Protest Summarily Dismissed

On May 12, 1981, the State of Alaska filed a protest pursuant to Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA) of December 2, 1980 (P.L. 96-487) against the Native allotment applications listed in the attached Appendix. The State contends that

---

[1] See Attached Appendix.

these applications " . . . claim lands that appear to conflict with lands which have been patented to the State of Alaska." On July 17, 1981, the State filed a single withdrawal of this protest as it pertained to Native allotment application AA-308 of Helen Ann Stickwan, deceased. Departmental policy provides that a withdrawn protest has no cause and effect against an application and the protest was dismissed as far as this case file was concerned.

The State's protest has been reviewed under the criteria setforth in Sec. 905(a)(5), ANILCA which provides that a Native allotment application be adjudicated under the Act of May 1906, as amended, if (1) an entity files a protest stating it has improvements on the applied for land, or (2) if the State files a protest claiming that land is necessary for access to public or State lands, to resources located on such lands or to a public body of water.

The protest filed by the State of Alaska did not state that the land described in the allotment application is the situs of improvements claimed by it or that of any of these lands are necessary for access. There is no provision in ANILCA which would allow the State to protest allotment applications on the basis that the lands may be patented to them. Therefore, as this protest was filed by the State of Alaska pursuant to Sec. 905 (a)(5) ANILCA and failed to meet the stated criteria for a valid protest, it must be and is hereby summarily dismissed. If it is later found that any of the allotment applicants had prior valid existing rights on lands subsequently conveyed to the State, action will be taken pursuant to the *Ethel Aquilar, et al* Decision of August 8, 1979 by the United States District Court, Civil Action Filed Number 176-271. This protest

has been made a matter for reference in any future adjudicative actions of record in each application listed in the Appendix.

An appeal from this decision may be taken to the Board of Land Appeals, Office of Hearings and Appeals, in accordance with the attached regulations in Title 43 *Code of Federal Regulations* (CFR), Part 4, Subpart E. If an appeal is taken, the notice of appeal must be filed in the Alaska State Office of the Bureau of Land Management within 30 days of the receipt of this decision. Do not send the appeal directly to the Board. The appeal and case history file will be sent to the Board from this office. The regulations also require the appellant to serve a copy of the notice of appeal, statement of reasons, written arguments or briefs on the Regional Solicitor, Alaska Region, U.S. Department of the Interior, 510 L Street, Suite 100, Anchorage, Alaska 99501. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations. Form 1842-1 is enclosed for additional information.

/s/ Robert E. Sorenson
Chief, Branch of Lands
and Minerals Operations

Enclosure:
Form 1842-1
Appeal Regulations

cc:

Bureau of Indian Affairs
P.O. Box 120
Anchorage, Alaska 99510
(w/cy of protest)

Bureau of Indian Affairs
P.O. Box 347
Bethel, Alaska 99559
(w/cy of protest)

Bureau of Indian Affairs
Federal Building and Courthouse
101 12th Avenue, P.O. Box 16
Fairbanks, Alaska 99701
(w/cy of protest)

Bureau of Indian Affairs
P.O. Box 3-8000
Juneau, Alaska 99801
(w/cy of protest)

Bureau of Indian Affairs
P.O. Box 1108
Nome, Alaska 99762
(w/cy of protest)

Alaska Legal Services Corporation
615 H Street, Suite 100
Anchorage, Alaska 99501
(w/cy of protest)

[Certified Receipt Omitted In Printing]

[Appendix Omitted In Printing]

DEAN K. DUNSMORE
Department of Justice
Environment & Natural Resources
Division
801 B Street, Suite 504
Anchorage, Alaska 99501-3657
(907) 271-5452
Facsimile (907) 271-5827
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WALTER LORD, Plaintiff, v. BRUCE BABBITT, Secretary of the Interior, et al. Defendants.	F94-0011-CV (JKS) DECLARATION OF CONNIE VAN HORN

I, CONNIE VAN HORN, do upon personal knowledge state:

1. I am currently employed by the United States Department of the Interior in the position of Native Allotment Coordinator, Bureau of Land Management, Alaska State Office, Anchorage, Alaska. I have held this position since December 13, 1992. I have been employed by the Department of the Interior and held various other positions within the Bureau of Land Management in Alaska from 1977 to 1983 and from 1984 until I assumed my current position in 1992.

2. In my position as Native Allotment Coordinator among other duties I oversee the processing, monitoring, and coordination of inquiries with respect to applications made pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

3. As a result of my past and current positions with the Bureau of Land Management I am personally familiar with the procedures employed by the Bureau of Land Management with respect to the processing of applications for and entries upon the public lands in Alaska including Alaska Native Allotment Act applications, homestead and primary place of residence applications, and the location and maintenance of mining claims, and the procedures and directions regarding the content and maintenance of files with respect to such applications.

4. I personally reviewed the file for the Alaska Native Allotment Act application of Walter Lord, Serial No. F014623, for purposes of responding to Interrogatory No. 4 of the Interrogatories submitted to defendants a copy of which response is Attachment 1 hereto. In order to respond to said Interrogatory No. 4, I also personally talked with various members of the BLM staff I work with and present employees of the Department of the Interior who previously were involved in the processing of Alaska Native Allotment Act applications as well as with former employees of the Department of the Interior who had been involved in the processing of Alaska Native Allotment Act applications.

5. As indicated in the attached Response to Interrogatory No. 4, Mr. Walter Lord's Alaska Native Allotment Application file has been reviewed several times

since that file was closed in 1963 following the Decision of May 31, 1963, Attachment 2 hereto, terminating the allotment application of Walter Lord. Reviews of the sort described in the attached Response to Interrogatory No. 4 have routinely been conducted of all Alaska Native Allotment Act application files when required to determine if new procedures and rules of law established by statute or by judicial or administrative decisions are applicable to the particular file, and to respond to inquiries with respect to a particular application. A notation of some nature that these reviews had occurred was, pursuant to the regular and established procedure, to have been placed in the file each time any such review was conducted. The conducting of these reviews did not constitute any reinstatement for further adjudication of the particular application, but would, where not conducted in order to respond to a specific inquiry, be for the purpose of determining if the application should be reinstated and additional proceedings conducted. If it is determined that a particular application should be reinstated and additional proceedings conducted, some form of notice would be given to the applicant of the reinstatement of his application, the additional proceedings, or of any new decision of the Bureau of Land Management pertaining to that application. If, following these reviews, an allotment application is not reinstated for further adjudication, no notice would be given.

6. The Alaska Native Allotment Application file of Mr. Walter Lord was closed on May 31, 1963, Attachment 3 hereto, and while it has been reviewed for various purposes it has not since that time been reinstated for further adjudication. As indicated in the attached

Response to Interrogatory No. 4, the post-1963 reviews conducted of Mr. Walter Lord's allotment application file concluded that no additional proceedings were required with respect to that application, and that the file had been properly closed in 1963 and should remain closed.

7. Where the United States mail is utilized by the Bureau of Land Management to send notices, orders, decisions or other documents to various recipients, and if that material is returned by the Post Office as not delivered, the regular and established procedure has been and remains today to ensure that such returned material is placed in the Bureau of Land Management file to which it pertained. Therefore, if any material sent by the Bureau of Land Management by means of the United States mail is returned by the Post Office as not delivered, this material should pursuant to established procedure be found in the relevant file.

8. The regular and established procedure described in paragraph 7 above was and remains applicable to applications for allotments pursuant to the Alaska Native Allotment Act. Therefore, if any correspondence or other documents sent by the Bureau of Land Management to Mr. Walter Lord by means of the United States Mail pertaining to his allotment application F014623 was returned by the Post Office as undelivered, that correspondence or document should have been placed in the Bureau of Land Management's file Serial No. F014623. In my review of the file for Serial No. F014623 I have determined that this file contains no document which was returned by the Post Office as undelivered.

9. The regular and established procedure of the Bureau of Land Management has been and is to send a copy of every notice, order or decision involving an application for an Alaska Native Allotment application to the applicant at the address provided by the applicant. If copies were sent to anyone else, that would be noted on the document. Pursuant to this procedure, presence in the file, Serial No. F014623 of the Notice, Submission of Evidence of Use and Occupancy Required dated January 4, 1963, Attachment 4 hereto, would have been sent to Mr. Walter Lord, General Delivery, Fairbanks, Alaska, by use of the United States Mail.

10. Pursuant to the procedure set forth in paragraphs 7 and 8 above, if the Notice, Attachment 4 hereto, had been returned by the Post Office as undelivered, the returned document would have been placed in the file Serial No. F014623.

11. Pursuant to the established and regular procedures of the Bureau of Land Management, the decision of May 31, 1963, terminating Mr. Walter Lord's allotment application would have been sent to him at the address provided by the applicant. My review of the file pertaining to this application, Serial No. F014623, shows that a copy of this decision was sent to him by Certified Mail return receipt requested, and that the return receipt for delivery by the Post Office of this decision was returned which bears the signature of Etta Mae Lord. A copy of the return receipt is Attachment 5 hereto.

12. In my review of the Alaska Native Allotment Act application file for the application of Mr. Walter Lord, Serial No. F014623, I have determined that prior to May

31, 1963, plaintiff submitted no statement whatsoever that he had used and occupied the lands sought in that application for a period of five years.

13. Pursuant to the established procedures of the Department of the Interior, an adjudication of the Alaska Native Allotment Application of Walter Lord, No. F014623, was conducted and completed on May 31, 1963, with the issuance of the decision which is Attachment 2 hereto. Pursuant to the definition of adjudication utilized by the Bureau of Land Management set forth in the *Glossary of Public Land Terms*, United States Department of the Interior, 1949, reprinted without revision June 1959, Attachment 6 hereto, an Alaska Native Allotment Act application has been adjudicated by the Department of the Interior if it is determined that the applicant is not entitled as a matter of law to the allotment sought in that application. In this instance (1) since the Alaska Native Allotment Act, 43 U.S.C. § 270-3 (1970), required as a condition of entitlement to an allotment under that act that an applicant substantially and continuously used the lands sought for a period of five years, (2) since the applicable regulations required the applicant to submit proof of such use and occupancy, 43 C.F.R. § 67.7 (1963), and provided that the application would be terminated if this proof was not provided, 43 C.F.R. § 67.5(f) (1963), and (3) since no such proof was provided after notice to provide the same was mailed to the applicant the Bureau of Land Management issued its decision of May 31, 1963, Attachment 2 hereto. This termination constituted, under the procedures of the Bureau of Land Management, an adjudication by the Department of the Interior of the

entitlement of Mr. Walter Lord to the allotment sought in his allotment application.

14. Attachments 1, 2, 3, 4 and 5 hereto are true and complete copies of documents maintained in the regular course of business in the Alaska Native Allotment application file for the application of Walter Lord, No. F014623.

15. Attachment 7 hereto is a copy of a letter dated February 27, 1964, from O.L. Williamson, to Mr. Walter Lord. I do not have any personal knowledge of who Mr. O.L. Williamson was or with whom he was employed at the time. A copy of this letter is not contained in the Alaska Native Allotment application file for the application of Walter Lord, No. F014623. I have since learned that a copy of this letter was contained in a file formerly maintained by the Bureau of Indian Affairs. This indicates that Mr. Williamson may have been an employee of the Bureau of Indian Affairs. If Mr. Williamson was an employee of the Bureau of Indian Affairs or some other bureau of the Department of the Interior other than the Bureau of Land Management, and a copy of the letter of February 27, 1964, was not sent to the Bureau of Land Management, then a copy of this letter would not under the established procedures ordinarily be found in the Alaska Native Allotment application file for the application of Walter Lord, No. F014623. A copy of Attachment 7 is not in the Alaska Native Allotment application file for the application of Walter Lord, No. F014623.

I, CONNIE VAN HORN, declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of July, 1997.

/s/ Connie Van Horn
CONNIE VAN HORN

DEAN K. DUNSMORE
Department of Justice
Environment & Natural Resources
Division
801 B Street, Suite 504
Anchorage, Alaska 99501-3657
(907) 271-5452
Facsimile (907) 271-5827
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WALTER LORD, Plaintiff, v. BRUCE BABBITT, Secretary of the Interior, et al. Defendants.	F94-0011-CV (JKS) RESPONSE TO INTERROGATORY NUMBER 4

Defendants submit the following response to Interrogatory No. 4 to Plaintiff's First Set of Interrogatories and Requests for Admissions which were served by mail on defendants on March 28, 1997.

Interrogatory No. 4: If the file that the Department of the Interior maintained for Mr. Lord's Native Allotment Application file was reviewed by any employee or agent of the Department of the Interior after 1964, please identify the person(s), explain in detail the reason or purposes that they reviewed the file and identify any

documents generated relating to the employee or agent's review.

Response: To the extent defendants have not previously objected to the scope of information sought in this interrogatory, defendants respond as follows:

1. May 1980: Native Allotment Review Project

Walter Lord's casefile was one of many cases reviewed during an audit of closed Native allotment applications to determine if closure was proper. This review resulted in the determination that the file was properly closed and that it required no further examination.

Casefile Page No.: 28

Document: "NATIVE ALLOTMENT REVIEW" (form created 12/17/79)

Prepared by: Judy Bowers

Job Title in 1980: Land Law Examiner (Alaska State Office, BLM)

Current Job Title: unknown

Current Address: unknown

This review form was also signed off by the following individuals, although there is no way to ascertain the extent of their actual involvement with the specifics of the case:

Helen Elleven, Land Law Examiner (no longer with BLM – current address unknown)

Robert E. Sorenson, then Chief of the Branch of Lands and Minerals Operations, Alaska State Office, BLM (now retired).

2. June 1981: Mini-3 Native Allotment Review Project

The "Mini-3 Review" was a Native allotment audit project conducted after the conclusion of the 180-day protest period allowed by Sec. 905 of ANILCA. Cases were screened to determine, among other things, whether or not an application qualified for legislative approval under Sec. 905 of ANILCA or whether full adjudication under the 1906 Act was required.

The Mini-3 checklist in Walter Lord's casefile indicates only that a computer abstract of the case was reviewed to verify data.

Casefile Page No.: 158

Document: "MINI-TEAM #3 ADJUDICATOR CHECK-LIST" (form)

Prepared by: Karen J. Collie

Job Title in 1981: Land Law Examiner (Alaska State Office, BLM)

Current Job Title: Realty Specialist (Anchorage District, BLM)

Current Address: 6881 Abbott Loop Road, Anchorage AK 99507

Current Telephone: (907) 267-1210

3. January 1982: Decision Dismissing State Protest

On January 18, 1982, BLM dismissed State of Alaska protests on a number of Native allotment applications,

including the application of Walter Lord. The State had protested numerous Native allotment applications under Sec. 905 of ANILCA to prevent legislative approval and force 1906 Act adjudication of allotment applications on lands patented to the State prior to the passage of ANILCA on December 2, 1980. BLM dismissed the protests as not meeting the specific criteria set forth in Secs. 905(a)(5)(B) and 905(a)(5)(C) of ANILCA.

Casefile Page Nos.: 20-22

Document: "Protest Summarily Dismissed" (decision)

Prepared by: Mary Nagel

Job Title in 1982: Land Law Examiner(Alaska State Office, BLM)

Current Job Title: Land Law Examiner(Colorado State Office, BLM)

Current Address:2850 Youngsfield Street, Lakewood CO 80215-7076

Current Telephone: (303) 239-3778

This decision was surnamed by Miki J. Smith (now deceased) and Barbara Yoppke (now retired), both Land Law Examiners, and was signed by Robert E. Sorenson, Chief, Branch of Lands and Minerals Operations (now retired).

4. May 1982: Native Allotment Review

This review utilized the same review form as that used in the 1980 review referenced in entry no. 1 above. The adjudicator concluded that Walter Lord's application

should be reinstated "for exclusion purposes only, pending outcome of litigation." The form is a two-section document; the adjudicator's conclusion appears on Section I.

Casefile Page No.: 34

Document: "NATIVE ALLOTMENT REVIEW" (form created 12/17/79)

Prepared by: Marcia Walker

Job Title in 1982: Land Law Examiner (Alaska State Office, BLM)

Current Job Title: Land Law Examiner (Alaska State Office, BLM)

Current Address: 222 West 7th Avenue, #13, Anchorage, AK 99513

Current Telephone: (907) 271-3143

5. November 1983: Native Allotment Review

This review resulted in the conclusion that the reinstatement for exclusion purposes that was recommended by the May 1982 review (see entry no. 4) was in error. The conclusion appears on Section II of the same two-section form that was used in the May 1982 review.

Casefile Page No.: 34

Document: "NATIVE ALLOTMENT REVIEW" (form created 12/17/79)

Prepared by: Linda K. Butts

Job Title in 1983: Land Law Examiner (Fairbanks District, BLM)

Current Job Title: Realty Specialist (Northern District, BLM)

Current Address: 1150 University Avenue, Fairbanks, AK 99709

Current Telephone: (907) 474-2324

6. May 1984: Review in conjunction with Telephone Inquiry

This memo documents a telephone conversation between Kayla Copeland, BLM Fairbanks District, and George Tobuk, Tanana Chiefs conference, in which Ms. Copeland advised Mr. Tobuk that the Walter Lord casefile was properly closed due to non-filing of evidence of use and occupancy during the 6-year statutory life of the claim and would remain so "until directed by court decision or Bureau directions."

Casefile Page No.: 36

Document: "MEMO TO FILE" (form)

Prepared by: Kayla Copeland

Job Title in 1984: Land Law Examiner (Fairbanks District, BLM)

Current Job Title: Administrative Assistant (Alaska Interagency Fire Coordination Center)

Current Address: P.O. Box 35005, Ft. Wainwright, AK 99703

Current Telephone: (907) 356-5509

7. August 1984: Review in Conjunction with Telephone Inquiry

This memo documents a telephone conversation between Linda K. Butts, BLM Fairbanks District, and Norman McLemore, BIA Fairbanks Agency, in which Ms. Butts advised Mr. McLemore that the reinstatement of Walter Lord's Native allotment application was for administrative purposes only and the case was considered properly closed.

Casefile Page No.: 40

Document: "CONFIRMATION/REPORT OF TELEPHONE CONVERSATION" (BLM form 1541-3)

Prepared by: Linda K. Butts

Job Title in 1984: Land Law Examiner (Fairbanks District, BLM)

Current Job Title: Realty Specialist (Northern District, BLM)

Current Address: 1150 University Avenue, Fairbanks, AK 99709

Current Telephone: (907) 474-2324

8. April 1986: Review of Closed Native Allotment Cases

It would appear that this review was undertaken following the 1985 U.S. District Court ruling in the case of *Mary Olympic v. United States* to determine if any closed Native allotment casefiles should be reopened based on that ruling. Walter Lord's casefile was not reopened. The adjudicator who prepared this review document believes

the review may also have been for the purpose of determining if there were any closed applications remaining on BLM's master title plats that had been reinstated solely for administrative purposes and needed to be removed from the records. [Shortly after this review occurred BLM Instruction Memorandum No. AK 86-273 was issued that directed the removal of such administratively reinstated applications from the records, indicating "Their status as closed cases should not have been changed." A copy of this memorandum appears in Walter Lord's casefile at page no. 48, followed by a "CASE FILE CLOSURE SHEET" at page no. 49 indicating Mr. Lord's application was removed from the master title plat on October 31, 1986.]

Casefile Page No.: 47

Document: "MARY OLYMPIC NATIVE ALLOTMENT REVIEW" (form)

Prepared by: Jenice Prutz

Job Title in 1986: Land Law Examiner (Fairbanks District, BLM)

Current Job Title: Land Law Examiner (Alaska State Office, BLM)

Current Address: 222 West 7th Avenue, #13, Anchorage AK 99513

Current Telephone: (907) 271-3406

9. 1993: Statutory Life Audit

In 1993 BLM conducted an audit of all the Native allotment applications that had been closed for statutory

life expiration in order to determine which cases might require further review in keeping with the Interior Board of Land Appeals (IBLA) holdings in the cases of *Sockpealuk et al.* (115 IBLA 317), *Michael Gloko* (116 IBLA 145), *Andrew Balluta* (122 IBLA 30), and others. Based on the review of the Walter Lord casefile, it was determined that the file should remain closed.

Casefile Page Nos.: 51-52

Document: [untitled] Stat Life Audit (form)

Prepared by: Janice Yankus (now known as Janice Powers)

Job Title in 1993: Land Law Examiner (Alaska State Office, BLM)

Current Job Title: Unknown (no longer with BLM)

Current Address: Unknown

Current Telephone: Unknown

10. January 1994: Review for Response to Written Inquiry

Walter Lord's casefile was reviewed, and this letter prepared, in response to a letter from Mr. Lord's attorney, Robert A. Sparks, inquiring as to the status of the case and whether BLM would be able to issue an allotment certificate to Mr. Lord. The review of the casefile determined, and the letter to Mr. Sparks explained, that Mr. Lord's case had been properly closed and would not be reinstated.

Casefile Page Nos: 56-57

Document: Letter dated January 24, 1994, from Sharon E. Fleek, Chief, Branch of Doyon/Northwest

Adjudication (Alaska State Office, BLM) to Robert A. Sparks, attorney

Prepared by: Steve Flippen

Job Title in 1994: Land Law Examiner (Alaska State Office, BLM)

Current Job Title: Same

Current Address: 222 West 7th Avenue, #13, Anchorage AK 99513

Current Telephone: (907) 271-5918

Letter signed by: Sharon E. Fleek, now known as Sharon E. Warren

Job Title in 1994: Chief, Branch of Doyon/Northwest Adjudication (Alaska State Office, BLM)

Current Job Title: Chief, Branch of Northern Adjudication (Alaska State Office, BLM)

Current Address: 222 West 7th Avenue, #13, Anchorage, AK 99513

Current Telephone: (907) 271-5699

11. May 1994: Review for Response to Written Inquiry

Walter Lord's casefile was reviewed, and this letter prepared, in response to a letter from Mr. Lord's attorney, Robert A. Sparks, asserting his belief that Mr. Lord would be entitled to a hearing prior to denial of his Native allotment application. The response explained that Mr. Lord's application was terminated as a matter of law because of his failure to file evidence of five years' use and occupancy within six years of the filing of the application.

Casefile Page Nos.: 96-98

Document: Letter dated May 17, 1994, from Sharon E. Fleek, Chief, Branch of Northern Adjudication (Alaska State Office, BLM) to Robert A. Sparks, attorney

Prepared by: James F. Moore

Job Title in 1994: Land Law Examiner (Alaska State Office, BLM)

Current Job Title: Same

Current Address: 222 West 7th Avenue, #13, Anchorage AK 99513

Current Telephone: (907) 271-5732

Letter signed by: Sharon E. Fleek (see information in previous entry)

I, Connie Van Horn, on this 20th day of May, 1997, do declare subject to penalty. of perjury that the foregoing statements are true and correct.

/s/ Connie Van Horn
CONNIE VAN HORN
Native Allotment Coordinator
Bureau of Land Management,
Alaska State Office
222 West 7th Avenue, # 13
Anchorage, Alaska 99513

Pursuant to Rule 26(g)(2) of the Federal Rules of Civil Procedure, and D. Ak. LR 26.2(g)(2), I, Dean K. Dunsmore, on this 21st day of May, 1997, as attorney for defendants certify that to the best of my knowledge the

forgoing response to Interrogatory No. 4 is consistent with the requirements of said rules.

/s/ Dean K. Dunsmore
DEAN K. DUNSMORE
801 B Street, Suite 504
Anchorage, Alaska 99501-5827

[SEAL]

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Alaska State Office
222 W. 7th Avenue, #13
Anchorage, Alaska 99513-7599

F-014623 (2561)
(964)sf

24 JAN 1994

Robert A. Sparks
Law Office of William R. Satterberg, Jr.
Attorney at Law
709 Fourth Avenue
Fairbanks, Alaska 99701

Dear Mr. Sparks:

This letter is in regard to your letter of December 21, 1993, requesting the status and possible conveyance of Walter Lord's Native application F-014623. The application was for lands described as lot 4 and the $NE^1/_4NE^1/_4$ of sec. 30, T. 1 S., R. 1 W., Fairbanks Meridian, Alaska. These lands are patented to the State of Alaska under patent No. 50-86-0043, issued on November 12, 1985. The State's application was amended on June 16, 1972, to include the subject lands and Tentative Approval was issued on February 10, 1976.

On May 24, 1957, Walter Lord filed Native allotment application F-014623, claiming May 24, 1957, as the date of use and occupancy. On January 4, 1963, the Bureau of Land Management notified Mr. Lord that the time fixed by law in which to submit his proof of use and occupancy of the lands would expire on May 24, 1963.

By decision dated May 31, 1963, the Bureau of Land Management terminated the allotment application and the case file was closed of record. According to the records no appeal was filed by Mr. Lord pursuant to this decision. The decision was sent certified mail and the receipt showing Mr. Lord received this decision was returned on June 4, 1963. The receipt was signed by Etta Mae Lord. The Departmental Regulations at 43 Code of Federal Regulations 1810.2(b) states that the person is "deemed to have received communication if it was delivered to his last known address of record . . . regardless of whether it was in fact received by him."

In response to your assertion that the applicant was not granted an administrative hearing and application F-014623 was legislatively approved, an administrative hearing is only required for issues of fact, not when a application is legally defective. The application was not legislatively approved because the lands were not in Federal ownership on December 2, 1980.

Due to recent Interior Board of Land Appeals decisions concerning the statutory life of Native allotment applications, Mr. Lord's case file was reviewed in 1993 and it was determined that the applicant had been afforded due process and the case file was properly closed on May 31, 1963. Therefore, application F-014623 will remain closed and will not be reinstated.

If you have any questions, please contact me at 271-5699.

Sincerely,

/s/Sharon E. Fleek
Sharon E. Fleek
Chief, Branch of Doyon/Northwest
Adjudication

[SEAL]

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Alaska State Office
222 W. 7th Avenue, #13
Anchorage, Alaska 99513-7599

F-014623
(964)jm

17 MAY 1994

Mr. Robert A. Sparks
Law Office of William R. Satterberg, Jr.
709 Fourth Avenue
Fairbanks, Alaska 99701

Re: Native Allotment Application of
Walter Lord. F-014623

Dear Mr. Sparks:

I have read your letter of March 4, 1994. The following addresses the "Due Process" and "Legislative Approval" raised in your letter. Mr. Lord failed to provide " . . . proof of substantially continuous use and occupancy of the land within six years from the date of filing the application. . . . ," thereby failing to perfect his interest in the land. His application was terminated as a matter of law and not by any determination of fact made by this agency. *see* 43 C.F.R. § 2561.2; *see also* 43 C.F.R. § 67.5(F) (1963).

While *Pence v. Kleppe*, 529 F.2d 135 (1976) acknowledges Alaskan Natives' Fifth Amendment right to due process, it held that " . . . Alaska Natives who occupy and use land for at least five years, in the manner specified in the Act *and the regulations*, rely on their continued right to

that land. . . . " [Emphasis added.] The regulations at 43 C.F.R. § 2561.2(a) provide that:

> An allotment *will not be made until* the lands are surveyed by the Bureau of Land Management, and until *the applicant* or the authorized officer of the Bureau of Indian Affairs *has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years* by the applicant. *Such proof shall be made on a form approved by the Director, Bureau of Land Management, and filed in the proper land office.* If made by the applicant, it must be signed by him, but if he is unable to write his name, his mark or thumb print shall be impressed on the statement and witnessed by two persons. *This proof* may be submitted with the application for allotment if the applicant has then used and occupied the land for five years, or *may be made at any time within six years after the filing of the application when the requirements have been met.* [Emphasis added.]

Moreover, Mr. Lord was given notice of the impending loss of his interest by a Notice dated January 4, 1963, sent to him at General Delivery, Fairbanks, Alaska. *see* Enclosed copy of notice. The notice advised Mr. Lord that his interests in the land would expire unless he completed and returned a form, proof of use and occupancy by May 24, 1963. Not only was he reminded of the expiration date, he was given the form and instructions for its completion: "The proof must be executed and filed in this office in triplicate on Form 4-1426. Please refer to the enclosed information pamphlet for instructions pertaining to the completion of the form." The Bureau's record is absent a Form 4-1426 executed by Mr. Lord and it has

been thirty-seven years since Mr. Lord applied for the land. Therefore, this agency was in 1963 and remains unable to grant (rather than reject) Mr. Lord's application.

There is no record of a dispute between this agency and Mr. Lord regarding the land. Although the State of Alaska filed a claim to the land in 1960 it was subordinate to Mr. Lord's. For whatever reason, Mr. Lord failed to complete the next step in the process of acquiring the land. On May 24, 1957, he said he wanted the land and the United States agreed, provided Mr. Lord made substantial use of the land, occupied it during the ensuing years[1] and made proof of such use and occupancy within six years of his application. Mr. Lord failed to meet those conditions thereby terminating his interests. As the *Pence* court noted when it cited the United States Supreme Court in *Board of Regents v. Roth,* 1972, 408 U.S. 562, "To have a property interest . . . a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." With the termination of Mr. Lord's interests, the State of Alaska gained a priority interest in the land.

Since the State gained a priority interest in the land and a conveyance of the land on November 12, 1985, the land was not in Federal ownership on December 2, 1980, the date the Alaska National Lands Conservation Act (43 U.S.C. § 1634) was passed into law. The State's interests notwithstanding, Mr. Lord's application was terminated

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[1] Unlike the vast majority of the native allotment claims. Mr. Lord's claim was not a claim per se but rather an application whereby he would gain both his equitable and legal interest in the realty through future use.

on May 24, 1963, and therefore not pending on December 18, 1971. Thus, the "legislative approval" provision of § 905 of ANILCA is inapplicable.

Sincerely,

/s/ Sharon E. Fleek
Sharon E. Fleek
Chief, Branch of Northern Adjudication

Enclosure:
Copy of 1/4/63 Notice to Mr. Lord

Robert John
Law Office of Robert John
709 4th Avenue
Fairbanks, Alaska 99701
Phone: (907) 456-6056

Robert A. Sparks
1552 Noble Street
Fairbanks, Alaska 99701
Phone: (907) 451-0875

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF ALASKA

WALTER LORD Plaintiff, vs. BRUCE BABBIT, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, and the UNITED STATES OF AMERICA, Defendants.	Case No. F94-011 Civil

PLAINTIFF'S THIRD AMENDED COMPLAINT

COUNT I

1. This is an action over which the Court has jurisdiction pursuant to 5 U.S.C. § 702, 25 U.S.C. § 345, 28 U.S.C. § 1331, 28 U.S.C. § 1346(f), 28 U.S.C. § 2409(a), 43

U.S.C. § 1353, and 43 U.S.C. § 1634(a)(1) to, *inter alia*, determine Plaintiff Walter Lord's interest in and quiet title to an Alaska Native allotment comprised of certain real property located within this judicial district in Fairbanks, Alaska, State of Alaska, more particularly described as follows:

> Lot 4 and the N.E. Quarter of the N.E. Quarter of Section 30, Township 1S Range 1W, Fairbanks Meridian.

2. Plaintiff Walter Lord is an Alaska Eskimo Indian and he applied for his allotment pursuant to the Alaska Native Allotment Act, 43 U.S.C. § 270-1-270-3 (1970) (repealed). Plaintiff's Alaska Native Allotment application is submitted herewith as Exhibit "1" to this Complaint and is incorporated by reference herein as if fully set forth.

3. The Defendants are Secretary of the United States Department of the Interior and the United States of America.

4. Plaintiff Walter Lord filed his application with the United States Department of the Interior, Bureau of Land Management, in Fairbanks, Alaska, for a Alaska Native Allotment on May 24, 1957. The allotment application indicated Mr. Lord's intent to use and occupy the land described in the application.

5. Following the date of his application, Mr. Lord used and occupied the land for purposes of building a fish camp, for a subsistence fishing site, hunting, trapping, firewood gathering for home heating and berry picking, from that date until late in 1971 or 1972.

6. Plaintiff's use of the land described in his application for a Native Allotment vested equitable title in the land in Plaintiff on or about May 25, 1962, and this equitable title created a "preference right" in Plaintiff under the Alaska Native Allotment Act as of and relating back to the date of Plaintiff's application and commencement of use and occupation of the land on or about May 24, 1957.

7. On May 31, 1963, Defendants purported to deny Plaintiff's Native Allotment Application, by sending a registered letter to Plaintiff stating that Plaintiff had failed to comply with regulations contained at the time at 43 C.F.R. § 67.5(f), regarding proof of use and occupancy of the land described in Plaintiff's Native Allotment Application.

8. The regulations contained at 43 C.F.R. § 67.5(f) exceed and are contrary to the statutory authority of the Department of the Interior and are otherwise null and void.

9. The administrative action on Plaintiff's allotment application pursuant to 43 C.F.R. § 67.5(f) violated the Department of the Interior's own regulations, and in any event did not constitute an adjudication of the merits of Plaintiff's Allotment Application but allowed Plaintiff to resubmit his application with all the rights and benefits relating back to his commencement and use of the land on or about May 24, 1957.

10. Defendants' Notice dated May 31, 1963, failed to comply with due process because it was legally insufficient and invalid or void, as it was not reasonably expected to provide Plaintiff with actual notice of the

Defendants' decision, because the notice was addressed and mailed to Plaintiff at "General Delivery, Fairbanks, Alaska," when Plaintiff's address was easily available to the Defendants from the United States Post Office, the Notice was not sent certified mail, restricted delivery, and was not delivered by the United States mail to Plaintiff and the Notice failed to inform Plaintiff of his right to appeal the decision to deny his Native Allotment Application.

11. In *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit held that the regulations relied upon by the Department of the Interior requiring applicants for Alaska Native Allotments to submit written evidence of their use and occupancy of the land described in the Allotment Applications, and denying the Applicants oral hearings with the ultimate fact finder to present evidence regarding their use and occupancy of the land described in their Allotment Applications, violated due process of law and that the applicants whose claims are rejected must be notified of the specific reasons for the proposed rejection and allowed to submit written evidence and request an oral hearing before the finder of fact, prior to a decision to reject an Allotment Application.

12. In 1980, the United States Congress enacted the Alaska National Interest Lands Conservation Act, Public Law 96-487, 94 Statutes 2371, directing the Secretary of the Interior to approve or adjudicate applications for Alaska Native Allotments erroneously rejected without a hearing prior to December 18, 1971.

13. Enactment of the Alaska National Interest Lands Conservation Act was a legislative waiver of any statute of limitations for actions to determine interests of Alaska Indians in Allotments, whose applications were denied without an opportunity for an oral hearing prior to December 18, 1971.

14. Alternatively, any statute of limitations applicable to Plaintiff's claim will not start to run until Defendants have complied with the mandate of the Alaska National Interest Lands Conservation Act and completed adjudication of Plaintiff's application.

15. Plaintiff's preference right and equitable title to the land described in his Application for an Alaska Native Allotment caused the United States to have no authority to convey such land to the State of Alaska.

16. Defendants, on information and belief, conveyed the land described in Plaintiff's Allotment Application to the State of Alaska in 1985.

17. The Defendants owe Plaintiff, an Alaska Eskimo, a special duty analogous to that of a trustee, in Defendants' conduct toward Plaintiff and his Application for a Native Allotment.

18. Plaintiff seeks to compel Defendants to provide Plaintiff with an adjudication to allow Plaintiff to establish facts which would establish his right to allotment he has an equitable interest in under the Alaska Native Allotment Act and to reinstate such application.

19. Defendants' denial of Plaintiff's Application for an Alaska Native Allotment without holding a hearing is arbitrary and capricious and violated Plaintiff's right to

due process of law. *Pence v. Kleppe*, 592 F.2d 135 (9th Cir. 1976).

20. Plaintiff seeks an order of this Court requiring that Defendants provide Plaintiff with an adjudication to allow Plaintiff to establish facts which would establish his right to allotment he has an equitable interest in and to require the Defendants to recover the land described in Plaintiff's Application for an Alaska Native Allotment and convey it to Plaintiff, in the event that Plaintiff establishes his right to the approval of his Application for an allotment.

21. Plaintiff alleges that his application was pending on or before December 18, 1971, and was Legislatively approved by section 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1).

22. Plaintiff's remedy at law is inadequate, and Plaintiff seeks injunctive relief from this Court to require that the Defendants comply with the Congressional mandate to grant Plaintiff a factual hearing to adjudicate his allotment application or to approve it and issue the Native Allotment as being Legislatively approved pursuant to the Alaska National Interest Lands Conservation Act, Public Law 96-487, 94 Statutes 2371 (1980), 43 U.S.C. § 1634(a)(1).

WHEREFORE, Plaintiff prays:

1.That this Court rule that Defendants' May 24, 1963, decision denying Plaintiff his Native Allotment, is void, because it exceeded and was contrary to the authority of the Department of Interior and it denied Plaintiff due

process of law in violation of the Fifth Amendment to the United States Constitution.

2. That this Court rule that Plaintiff's use and occupancy of the land described in his Application for an Alaska Native Allotment for five years ending May 25, 1962, vested equitable title and created a preference right in Plaintiff to the land described in the application as of and relating back to May 24, 1957.

3. That this Court rule that Defendants' purported conveyance to the State of Alaska of the land described in Plaintiff's Application for an Alaska Native Allotment is null and void and the Defendants lacked authority to convey such land to the State of Alaska.

4. That this Court rule that Defendants have an obligation to either adjudicate Plaintiff's right to his allotment or to approve Plaintiff's application pursuant to the Alaska National Interest Lands Conservation Act, 94 Statutes 2371 (1980), 43 U.S.C. § 1634(a)(1).

5. That this Court rule that Defendants have an obligation to recover the land described in Plaintiff's Application for an Alaska Native Allotment from the State of Alaska and to convey it to Plaintiff.

6. That this Court direct and order the Defendants to immediately recover from the State of Alaska the land described in Plaintiff's Application for an Alaska Native Allotment and to immediately convey said land to Plaintiff.

7. That this Court judicially approve and issue Plaintiff his Native Allotment pursuant to 25 U.S.C. § 345 and 43 U.S.C. § 1353.

8. That this Court quiet title to the Native Allotment in Plaintiff.

9. For an award of costs and attorney's fees and such further relief as the Court deems just and equitable in the premises.

DATED this 14th day of February, 1997, at Fairbanks, Alaska.

THE LAW OFFICE OF ROBERT JOHN

/s/ Robert John
Robert John
Attorney for Plaintiff
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